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In a series of cases that have come to be known as the "new federalism," five members of the current Supreme Court, led by Chief Justice William Rehnquist, have resurrected the concept of federalism in constitutional law. These cases represent a significant shift in the Court's approach to the federal-state balance. From the well known "switch in time that saved nine,"[1] clearing the way for President Roosevelt's New Deal legislation, federalism concerns had been largely dormant in the Court's decisions. In fact, during the interim, at least one prominent scholar questioned whether there any longer was a constitutional law of federalism.[2] In light of the new federalism cases,

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1. Honorable William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 594 (2004) (quoting FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 393 (1933)). Justice Roberts voted with a five justice majority to uphold New Deal legislation in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and is commonly perceived as having switched his vote from prior cases striking down New Deal legislation. On the switch generally, and President Roosevelt's Court packing plan that was thought to have provoked it, see Rehnquist *supra*.

2. CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 25 (1970) (arguing that if there is no implied limit on the scope of federal power reserving certain matters to the states, "the concept of *legally defined* federalism, judicially umpired, has . . . no substance").

few would pose that question today; the Court has relied on a number of distinct doctrines over the last fifteen years to strike down congressional statutes in the name of federalism. Of course, there is no specific "federalism" clause in the Constitution. To justify its decisions, therefore, the Court has relied on other interpretive tools, applying principles derived from the Constitution's history and structure. In this article, I focus on the latter method—invocation of general constitutional principles derived from the Constitution's structure. This approach, known as "structuralism" or "structural reasoning/analysis," is hardly a novel invention of the Rehnquist Court. In fact, examples of structural reasoning in constitutional interpretation can be found throughout our nation's history and as early as the first Congress.[3] In the new federalism cases, both the majority and the dissenters rely on structural arguments to support their positions.

Structuralism is a perfectly legitimate and often enlightening interpretive tool that balances two competing premises of written constitutionalism, adherence to the Constitution's text and sufficient flexibility to apply across time as circumstances evolve. But like any interpretive methodology, structural interpretation must be done well, and the structural arguments offered by both the majority and the dissenters in the new federalism cases have been fundamentally flawed. Before relying on a principle pulled from the Constitution, an interpreter must read the document holistically to ensure that the principle is consistent with the *entire* Constitution. Read as a whole, the Constitution requires a balanced approach to federalism that takes account of two countervailing principles—state sovereignty and federal supremacy. In the new federalism cases, however, the majority relies exclusively on the state sovereignty principle, using it to strike down various laws that somehow impose upon the states. The dissenters, on the other hand, focus solely on the federal supremacy principle and therefore consistently vote to uphold the challenged federal action. By focusing on one principle, to the exclusion of the other, both the majority and the dissenters have failed to consider the Constitution's true structure.

Parts I through III of this Article address structural interpretation generally, looking more closely at what it is, how it is applied, and why it is legitimate. Part IV describes the new federalism's state

3. *See* Kent Greenfeld, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 93–97 (1993) (evaluating use of underlying principles as interpretive methodology employed by first Congress).

sovereignty/federal supremacy debate in context, and Part V critiques the Court's structural analysis, arguing that both the majority and the dissenters have failed to accurately capture the Constitution's structure. Where each side invokes either state sovereignty or federal supremacy, both should instead consider how these two countervailing principles interact with one another. Under this balanced approach to federalism, supremacy will normally prevail where Congress has acted within the scope of its enumerated powers and state sovereignty where Congress acts outside its delegated sphere. In each case, however, the Court should weigh the relative sovereignty and supremacy interests at stake and determine whether to depart from the general rule.

I. WHAT IS STRUCTURALISM?

Before beginning an analysis of structural interpretation and its application in the federalism revival of the last fifteen years, it is important to pin down what structural interpretation is, as the term has been used in two seemingly different ways. The first of these refers to a method of deriving constitutional rules from the relationships and interactions between various constitutional institutions, or "structures," and was championed by Professor Charles L. Black, Jr. in his book, *Structure & Relationship in Constitutional Law*.[4] Black believed that the Warren Court's individual rights decisions relied on strained interpretations of precedents or particular constitutional texts and could be better justified using a forgotten interpretive method he called "inference from structure."[5] His interpretations build "inferences from the existence of constitutional structures and the relationships which the Constitution ordains among" them.[6] The method can best be demonstrated through Black's own central example of a case that, though rightly decided, could have been better justified on structural grounds—*Carrington v. Rash*.[7]

Carrington involved a provision of the Texas Constitution prohibiting any member of the armed forces who moved to Texas

4. CHARLES L. BLACK, JR., STRUCTURE & RELATIONSHIP IN CONSTITUTIONAL LAW (1969). The book was adapted from Professor Black's White Lectures on Citizenship at Louisiana State University in 1968.

5. *Id.* *See also* PHILIP BOBBITT, CONSTITUTIONAL FATE 77–78 (1982) (discussing Black's structural method of interpretation).

6. BOBBITT, *supra* note 5, at 74; *see also* BLACK, *supra* note 4, at 7 (describing "method of inference from the structures and relationships created by the constitution in all its parts or in some principle part").

7. 380 U.S. 89 (1965).

during the course of military service from voting while still in the military.[8] The Supreme Court held that the provision violated the Equal Protection Clause because it denied all military personnel a fundamental right with only a remote administrative benefit to the state.[9] Black, however, felt the Court's rationale was unsatisfying, and believed the decision could be better justified by reasoning that the law offended the "structure of the federal union."[10] The Constitution creates a federal structure, comprised of both the federal government and the state governments. No state, he believed, should be allowed to "annex any disadvantage simply and solely to the performance of a federal duty," as doing so interferes with "the relation of the federal to state governments."[11]

Modern scholars, while often citing Black to justify the use of structural interpretation, tend to define the concept differently, referring to inferences or principles that can be derived from the structure of the document. For example, Professor Laurence Tribe has described "structural inference" as searching for answers to constitutional questions in the document's "patterns and premises, layout and logic, assumptions and animating principles,"[12] and Professor Akhil Reed Amar has described it as reading "the document holistically and attend[ing] to its overarching themes."[13] The principles or themes derived from the Constitution can help give meaning to ambiguous constitutional texts[14] or answer questions not directly addressed by the

8. *Id.* at 89.

9. *Id.* at 96.

10. BLACK, *supra* note 4, at 10–11.

11. *Id.* at 11.

12. Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present*, 113 HARV. L. REV. 110, 110 n.3 (1999) (evaluating the Rehnquist Court's willingness to employ structural reasoning in some contexts but not others).

13. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000) (arguing that doctrinal arguments are over-employed at the expense of textual or "documentarian" arguments). Other scholars, describing the same interpretive tool, have called it by different names. *See, e.g*, Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1281 (2001) (defining holism as "an approach that seeks to take into account the basic structure and values of the Constitution in the interpretation of all of its provisions"); Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1335–37 (1992) (defining "penumbral reasoning" as extracting common ideas from constitutional provisions and applying the idea to other topics).

14. *See* Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1631–32 (2000) (noting that the "meaning of a particular term in the Constitution" can be derived using "a broader set of constitutional purposes and principles").

text.[15] In this sense structuralism refers to the structure of the document itself, not to the relationships between structures it creates.

On the surface it appears that Professor Black's structuralism is a particular application of the broader structuralism espoused by others—the relationship between the federal government and the states, *federalism*, is a broad principle that can be derived from the Constitution read as a whole. Upon closer evaluation, however, the differences between the two methods disappear entirely. The Constitution is a foundational document; its purpose is to recognize existing structures and to create new ones, and to govern the relationships between them.[16] Therefore, any theme or principle that can fairly be derived from the Constitution will necessarily relate to some structure or to a relationship between structures. Seen in this light, the two definitions do not represent distinct concepts, but instead describe the same interpretive method from slightly different vantage points.

Why then have scholars pulled away from Black's definition and employed the seemingly broader themes and principles concept? There are two possible explanations. One answer may be that structural interpretation is easier to conceptualize when viewed in this way. It is easier to say that retention of a legislative veto violates the principle of

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One example of this sort of reasoning is the Supreme Court's use of broad principles such as democracy and republicanism to help define the contours of the First Amendment. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 781–83 (1978); Tribe, *supra* note 12, at 160–61 n.245 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring in the judgment) ("[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.").

15. Examples of this application of structural interpretation include fundamental rights cases typified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the anticommandeering cases *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992). The structural aspects of all three cases are discussed at length *infra*.

16. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2–3, at 126 (3d ed. 2000) ("[N]othing lies closer to the core of constitutional law—law that *constitutes* (that, in its Latin roots, causes things to come together and stand up)."); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235 (1995). In the words of Professor Laurence Tribe:

> To understand the Constitution as a legal text, it is essential to recognize the sort of text it is: a *constitutive* text that purports, in the name of the People of the United States of America, to bring into being a number of distinct but interrelated institutions and practices, at once legal and political, and to define the rules governing those institutions and practices.

Id.

separation of powers[17] than to say that it would offend the relationship between the legislative and executive branches of government, which is characterized by the separation of powers. The first employs the interpretive principle directly while the second requires an intervening step, though the same concept does the work in each. Of course, this does not mean that saying "separation of powers" answers the question. When articulating a structural argument one must be careful to spell out the underlying basis of the theme/relationship employed. For example, in the legislative veto case, *INS v. Chadha*,[18] the Supreme Court employed the separation of powers principle directly, but took care to discuss the basis of the principle—that the legislative veto sidesteps important constitutional checks on legislative power, such as the President's veto.[19]

Another possible explanation is substantive. Many arguments employing the broader definition of structuralism have focused, at least in part, on its use in protecting individual rights.[20] This could betray a concern that a focus on the relationships between structures overlooks the Constitution's provisions dealing with individual rights.[21] If so, the concern is unfounded. Just as the Constitution recognizes the state governments and establishes their relationship with the federal government, it also recognizes "the people," and establishes their relationship to government.[22]

The Constitution's focus on the relationship between the government and the people begins with the first sentence—"We the People . . . do ordain and establish this Constitution for the United

17. *See* INS v. Chadha, 462 U.S. 919 (1983).

18. *Id.*

19. *Id.* at 957–58.

20. *See, e.g.*, Jackson, *supra* note 13, at 1301–03 (arguing that the enumerated powers should be construed in light of the "basic constitutional commitment to equality"); Reynolds, *supra* note 13, at 1334–47 (comparing use of "penumbral reasoning" in individual rights cases to its use in sovereign immunity and standing doctrines).

21. *See* BOBBITT, *supra* note 5, at 85 ("The second principal objection to structural approaches is that they can offer no firm basis for personal rights.").

22. *Cf.* TRIBE, *supra* note 16, at 46. For example, Professor Tribe has argued:

> At an even simpler level, rights-securing provisions simply are about organizational and institutional features of the constitutional scheme . . . if only because individuals . . . are decision-making units within our system for allocating decisional competence and sharing power, no less than are local governments, individual states, and the nation as a whole.

Id.

States of America"[23]—and continues in countless other provisions setting out the contours of the relationship. Although one commentator has argued that inferences derived from the relationship of "citizens" to government must be limited to the functioning of representative government,[24] this construction is unnecessarily narrow. The Constitution sets out the relationship through two distinct types of provisions; some relate to our control of government by establishing elections for office[25] and ensuring the right to vote,[26] and others, such as the Bill of Rights, set limits on the power of the government to constrain our liberty.[27] Focusing on the first type ignores half of the relationship established by the Constitution.[28] Thus, defined in either way structuralism is a comprehensive interpretive tool that can be applied to individual rights questions.

Whether speaking in terms of the relationships between constitutional structures or the structure of the document itself, the broad principles underlying the Constitution drive the analysis. Because the two definitions of structural interpretation describe the same interpretive methodology in different ways, there is no reason to choose one over the other. This Article, then, will make use of both definitions throughout, referring to one or the other where appropriate to illuminate the discussion.

II. STRUCTURAL INTERPRETATION IN SUPREME COURT JURISPRUDENCE

Although one of Professor Black's main themes in *Structure and Relationship in Constitutional Law* was his perception that structural interpretation was under-utilized by the Warren Court, the

23. U.S. CONST. pmbl.

24. BOBBITT, *supra* note 5, at 89–90.

25. *E.g.*, U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

26. *E.g.*, U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

27. Of course certain constitutional provisions, such as the First Amendment's free speech clause, are properly characterized as operating in both areas.

28. Part of the impetus for constraining the relationship to political rights may be the choice of the word "citizen," which itself implies a political relationship. The Constitution more often refers to the rights of "the people," *e.g.*, U.S. CONST. amend. II, IV, IX, X, or simply forbids Congress from legislating in certain areas, *e.g.*, U.S. CONST. amend. I. The Privileges or Immunities Clause of the Fourteenth Amendment is a notable exception, however.

methodology is not new to constitutional jurisprudence.[29] In fact, the Court has been using structural arguments in a variety of areas for over two hundred years. For example, commentators have noted the Supreme Court's use of structural analysis in several doctrinal areas, from federal sovereign immunity and plenary power over aliens[30] to standing[31] and the dormant Commerce Clause.[32] Examining a few of the prominent cases and doctrinal areas in which structuralism has played an important role will help to further illustrate what structuralism is, how it is used (and misused), and why it is a legitimate method of interpretation.

A. The Structural Basis at the Foundation of American Constitutional Law—Key Examples of Structural Reasoning from Both Perspectives

Few cases can claim to have had more of an impact on the development of American constitutional law than Chief Justice John Marshall's opinions in *Marbury v. Madison*[33] and *McCulloch v. Maryland*.[34] *Marbury* established the principle of judicial review,[35] and as a consequence serves as the foundation for any legal challenge to the constitutionality of a federal law.[36] *McCulloch* set the baseline for discerning what is within the power of the federal government, and for policing the boundaries between the federal government and the states.[37] Each case, therefore, serves as a base on which countless other precedents and doctrines rest; and each is itself largely grounded in structural reasoning.

Marshall's use of structural reasoning in *Marbury* is a helpful illustration of structural analysis from both Professor Black's relational

29. *See* John Harrison, *Review of Structure and Relationship in Constitutional Law*, 89 VA. L. REV. 1779, 1781 (2003) ("It seems to me that Professor Black was right about the importance of structurally derived limitations, but wrong about their under-use.").

30. *See* Young, *supra* note 14, at 1633.

31. *See* Reynolds, *supra* note 13, at 1337–40.

32. *See* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1093–96 (1997).

33. 5 U.S. (1 Cranch) 137 (1803).

34. 17 U.S. (1 Wheat.) 316 (1819).

35. In *Marbury*, Marshall held that the Judiciary Act of 1789, insofar as it purported to expand the original jurisdiction of the Supreme Court, was unconstitutional. Of course, to reach that holding, he first had to establish the broader proposition that the Supreme Court has the power to declare acts of Congress unconstitutional. 5 U.S. (1 Cranch) at 174–75.

36. *Id.* at 175–80. In fact, without *Marbury* and judicial review, many of the new federalism cases could not exist. *Lopez* and *Morrison*, *New York* and *Printz*, and *Seminole Tribe* and *Alden* all declare federals laws or parts of federal laws unconstitutional.

37. 17 U.S. (1 Wheat.) at 404–35.

perspective and the broader themes and principles perspective. To establish that the Constitution provides for judicial review, Marshall relied in sequence on two distinct structural themes,[38] beginning with the supremacy of the Constitution and its superiority to other law. To build support for this principle, Marshall begins with a prototypical example of Professor Black's relational structuralism:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.... The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.[39]

The supremacy of the Constitution, according to Marshall, is established by the relationship between citizens and government. The people are sovereign and express their "supreme will" through the written Constitution.[40] Because the government is a creation of the people, it cannot violate their will by enacting laws contrary to the Constitution.[41] Marshall then supports his constitutional supremacy premise further by showing that it is a theme expressed in the text of the Constitution, both by the language of the Supremacy Clause,[42] which mentions the Constitution first "in declaring what shall be the *supreme* law of the land,"[43] and in its nature as a written document.[44]

To move the theoretical concept of constitutional supremacy into

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38. *See* Amar, *supra* note 13, at 32. Professor Akil Amar has described *Marbury*'s strucutural arguments as follows:

> *Marbury*'s argument for judicial review is from start to finish an argument about the Constitution's structure, history, and text. The argument rests on two basic propositions. First, the written document is supreme law, enacted by the sovereign American People and thus superior to statutes enacted by ordinary legislatures. Second, judges should follow this supreme law even if it conflicts with a congressional statute.

Id.

39. 5 U.S. (1 Cranch) at 176.

40. *Id.*

41. *Id.* at 177.

42. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land....").

43. 5 U.S. (Cranch) at 180.

44. *Id.* at 177–78.

practice through judicial review, Marshall turns to a second structural principle—the role of the judiciary. Once again, his analysis begins by examining the relationship between constitutional structures, here examining the role of the judiciary in relation to the other branches of government: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[45] Marshall then makes the same point by pulling themes from the text of the document, pointing to various clauses in the Constitution that imply a role for the Court in examining the constitutionality of congressional action.[46] Some are direct, such as Article III's extension of the "judicial Power" to "all Cases . . . arising under this Constitution,"[47] and others more subtle, such as the prohibition on bills of attainder and ex-post-facto laws:[48] "The constitution declares that 'no bill of attainder or ex post facto law shall be passed.' If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?"[49]

Marshall then combined premise one, the supremacy of the Constitution, with premise two, that the judicial branch is charged with applying the Constitution, and concluded that the Supreme Court could declare laws that conflict with the Constitution void and refuse to enforce them.[50] *Marbury*, and its doctrine of judicial review, therefore, rely heavily on structural reasoning,[51] and serve as a good example of structural analysis from both the relational and themes and principles perspectives.

McCulloch v. Maryland also relies heavily on structural reasoning. *McCulloch* held that Congress had the power to incorporate a national bank, and that the state of Maryland was prohibited from taxing such a

45. *Id.* at 177.

46. *Id.* at 179.

47. U.S. CONST. art. III, § 2, cl. 1.

48. U.S. CONST. art. I, § 9, cl. 3.

49. 5 U.S. (1 Cranch) at 179.

50. *Id.* at 180 ("[A] law repugnant to the constitution is void; and . . . *courts*, as well as other departments, are bound by that instrument.").

51. Many scholars have discussed the structural reasoning in *Marbury v. Madison*. For two good examples, see Amar, *supra* note 13, at 32, and Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 914–27 (2003).

bank.[52] Marshall's reasoning on both points is largely structural,[53] a method explicitly acknowledged and defended early in his analysis:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.... [W]e must never forget, that it is a *constitution* we are expounding.[54]

Although, as with *Marbury*, it is possible to pull several examples of both relational and themes and principles structuralism from *McCulloch*,[55] the case serves best as an example of one particular aspect of thematic structural analysis—extra-textual effect. Often, when undertaking structural analysis, the Court will look to certain provisions of the Constitution as embodying independently enforceable principles that reach beyond the mere text of the provision. Marshall employed this strategy in part two of *McCulloch*, relying on extra-textual implications of the Supremacy Clause to determine that the state of Maryland did not have the power to tax a national bank incorporated by Congress.[56]

The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be

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52. 17 U.S. (1 Wheat.) 316, 426, 436 (1819).

53. On the structural reasoning in *McCulloch* see BLACK, *supra* note 4, at 14–15; *see also* Young, *supra* note 14, at 1649–51; Denning & Reynolds, *supra* note 32, at 1093–96.

54. *McCulloch*, 17 U.S. (1 Wheat.) at 407.

55. For example, in arguing that Congress has the power to incorporate a bank where that power is not explicitly granted by the Constitution, Marshall relies on relational structuralism:

> But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution.

Id. at 408.

56. 17 U.S. (1 Wheat.) at 425–37.

the supreme Law of the Land . . . ."[57] On its face, it says nothing about the right of a state to tax an enterprise undertaken by the federal government. Marshall, however, looked behind the mere language of the Clause, and gave effect to the principle of federal supremacy which it embodies:

> There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them.[58]

Having derived a broad principle of federal supremacy from the relatively narrow language of the Supremacy Clause (and other constitutional provisions), and having determined that the power to tax a federal enterprise would give the state the power to control the federal government,[59] Marshall concluded:

> It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.[60]

Thus, in *McCulloch*, Marshall read the Supremacy Clause as having a broader effect than the text of the provision alone would indicate—an "extra-textual effect." This interpretive technique is common in structural analysis, and, as will be examined in Part IV, has played an important role in the new federalism jurisprudence.

B. Structural Reasoning in Separation of Powers Cases—Examining the

57. U.S. CONST. art. VI, cl. 2.
58. 17 U.S. (Wheat.) at 426.
59. *Id.*
60. *Id.* at 427.

Constitution as a Whole

Structural analysis is commonplace in the Supreme Court's separation of powers jurisprudence.[61] For example, in *Bowsher v. Synar*,[62] the Court carefully constructed a general principle of separation of powers from various clauses in the Constitution:

> Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people.... Other, more subtle, examples of separate powers are evident as well. Unlike parliamentary systems ... no person who is an officer of the United States may serve as a Member of the Congress.... Moreover, unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings ....[63]

Having derived the principle, the Court then applied it to the case at hand, determining that Congress could not assign certain budget functions that were deemed "executive" to the Comptroller General (an employee subject to removal only by Congress), stating: "A direct congressional role in the removal of officers charged with the execution of the laws ... is inconsistent with separation of powers."[64]

Structural arguments can be found in several other separation of powers cases as well.[65] Though it will not be helpful to recount every

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61. *See* H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 535 n.38 (1999) (noting that "[m]uch of the Supreme Court's modern separation of powers jurisprudence explicitly rests on structural inference"); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 90 (1998) ("[S]eparation of powers principles often derive from structural inferences, rather than particular textual commands.").

62. 478 U.S. 714 (1986).

63. *Id.* at 722 (internal citations omitted).

64. *Id.* at 723.

65. For example, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, the Court relied on "basic separation-of-powers principles" to invalidate an attempt to condition transfer of control over Washington area airports to a local authority on the creation of a review board composed of congressmen with veto power. 501 U.S. 252, 277 n.23 (1991). Structural reasoning also played a prominent role in Justice Scalia's dissent from the Court's decision upholding the independent counsel law in *Morrison*

such instance here, focusing on one such case, *Youngstown Sheet & Tube Co. v. Sawyer*,[66] illustrates not just another example of structural reasoning in constitutional law, but an important example of why it is important to read the Constitution holistically when deriving structural themes; a lesson, as we will see, that has too often been overlooked in the Supreme Court's federalism cases.

The facts in *Youngstown* are well known. A labor dispute between most of the nation's steel mills and the United Steel Workers of America, C.I.O., culminated in a threatened nationwide strike in April 1952, while the nation was involved in the Korean War.[67] A few hours before the strike was set to begin, arguing that even a temporary disruption of steel production would endanger the country in a time of war, President Truman issued an executive order directing "the Secretary of Commerce to take possession of most of the steel mills and keep them running."[68]

The mill owners filed suit, challenging the President's order as exceeding his authority under the Constitution,[69] and the case quickly found its way to the Supreme Court. To support the President's action, the government urged a primarily structural argument, insisting that the power to seize the mills could be inferred from the powers specifically granted to the President by the Constitution:

> The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . ."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."[70]

Read together, but in isolation from the rest of the Constitution, one could reasonably derive a theme of expansive presidential authority

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v. Olson, 487 U.S. 654, 704 (1988) ("Our opinions are full of the recognition that it is the principle of separation of powers, and the inseparable corollary that each department's 'defense must . . . be made commensurate to the danger of attack,' which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power.") (internal citations omitted).

66. 343 U.S. 579 (1952).

67. *See id.* at 582–83.

68. *Id.* at 583–84.

69. *See id.* at 583.

70. *Id.* at 587.

from these provisions. The Court, however, declined to do so, and instead developed a broader theme of separated powers by balancing the Article II theme of presidential power against the powers of Congress set out in Article I.[71] Viewing the question in light of the Constitution as a whole, the Court properly held that the seizure had exceeded the President's authority.[72]

Few would disagree with the Court's belief in *Youngstown* that the proper theme to be derived from the Constitution is not expansive presidential authority, but a government of separated and limited powers.[73] *Youngstown* therefore shows that structural reasoning must begin with an examination of the Constitution as a whole, not merely one particular part. Focusing on any one provision, to the exclusion of others, can lead to the extraction of a principle that cannot fairly be derived from the document as a whole. Though the Court successfully avoided this tunnel-vision pitfall in *Youngstown*, it has not always been able to do so when adopting structural arguments.

C. Structural Reasoning in Fundamental Rights Jurisprudence—Answering the Charge of Indeterminacy

Structural reasoning has also played a prominent role in the Court's fundamental rights cases, serving as the basis from which to derive unenumerated rights. The archetypal example of structural reasoning in an individual rights case is Justice Douglas' opinion for the Court in *Griswold v. Connecticut*.[74] The decision in *Griswold* is well known; the Court held that a state law criminalizing the use of contraceptives (and consultation about the use of contraceptives by a doctor through an aiding and abetting statute) was unconstitutional because it violated the right to privacy.[75] Of course, there is no "right to privacy" provision in the Bill of Rights or elsewhere in the Constitution, but, as Justice Douglas rightly pointed out, that cannot end the analysis—"[t]he Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'"[76]

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71. *See id.* at 587–88.

72. *See id.* at 588.

73. *Id.* at 583–87.

74. 381 U.S. 479 (1965).

75. *Id.* at 485.

76. *Id.* at 484 (quoting U.S. CONST. amend. IX). Although Justice Douglas does rely on the Ninth Amendment, Justice Goldberg's concurring opinion in *Griswold* significantly expands upon its interpretation and application to the case. *Id.* at 486–499.

The source of the right to privacy on which Justice Douglas relied, however, was not simply the Ninth Amendment's admonition that there are unenumerated rights. Instead, he derived the right to privacy as a principle evidenced in other provisions of the Constitution securing individual rights:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.[77]

Justice Douglas then applied the privacy principle underlying or motivating various provisions of the Bill of Rights directly to the case at hand, and determined that the Connecticut law at issue was unconstitutional because it violated that principle.[78] *Griswold*, therefore, is a quintessential example of structural analysis.[79]

Although the structural methodology employed by Justice Douglas was by no means new or unique, his opinion has been the subject of significant criticism. Much of the criticism is unsurprising, having been leveled by conservative commentators championing originalism in

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77. *Id.* at 484 (internal citations omitted).

78. *Id.* at 485–86.

79. The structural nature of the *Griswold* opinion, and its relationship to structural reasoning in other cases, has been noted previously by several commentators, *see, e.g.*, Tribe *supra* note 12, at 139–40 (discussing the similarity in methodology between *Griswold* and various federalism cases); Reynolds, *supra* note, 13 at 1334–36 (describing the decision in *Griswold* and comparing the methodology to other doctrines), and, as pointed out by Professor Tribe, occasionally by Justices of the Supreme Court, Tribe, *supra* note 12, at 139–40, citing Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting) ("The full reach of that case's dramatic expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by the present majority's perception of constitutional penumbras rather than constitutional text.").

constitutional interpretation.[80] But unease with the opinion in *Griswold* is not confined to originalist conservatives, and doubts about its reasoning have been raised even by commentators who seek to further support the result.[81] In fact, *Griswold's* more famous progeny, *Roe v. Wade*,[82] appears to express doubt with *Griswold's* basis for the right to privacy,[83] and subtly de-emphasizes the penumbra rationale and shifts the focus to "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[84]

One might wonder, then, if structuralism is such a common and accepted method of constitutional interpretation, why there has been so much resistance to the structural rationale in *Griswold*. The answer, I believe, is that the application of structural analysis in *Griswold* is not particularly convincing. Like any method of analysis, structuralism can be done well and it can be done poorly,[85] and when done poorly it is not likely to be persuasive.

The problem with Justice Douglas' structural analysis is not that he derived a principle that is not there.[86] There undoubtedly is a privacy theme cutting across several provisions of the Bill of Rights; as Justice Douglas notes, the Third Amendment's prohibition against quartering[87] and the Fourth Amendment's prohibition against unreasonable searches and seizures[88] reflect a principle favoring protection from "governmental

80. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 99–100, 143 (1991) (criticizing the opinion in *Griswold* and later arguing that originalism is the only legitimate method of interpretation).

81. *See* RICHARD A. POSNER, SEX AND REASON 328 (1992) (expressing doubt that a convincing rationale exists to support the decision in *Griswold* but noting that "[a] constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian a law would stand revealed as containing major gaps"); Amar, *supra* note 13, at 75–76 (stating that the Court's reliance on the Fifth Amendment was "outlandish" and arguing than an equality rationale would have been more convincing); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 292–94 (1973) (agreeing that the statute in *Griswold* was unconstitutional, but stating that "[p]enumbras were not necessary, zones of privacy, an unfortunate invention, and reliance on the Fourth Amendment, a mistake").

82. 410 U.S. 113 (1973).

83. *Id.* at 152–55 (citing *Griswold* as one of several precedential bases for the right to privacy, and later stating "most of these courts have agreed that the right of privacy, *however based*, is broad enough to cover the abortion decision") (emphasis added).

84. *Id.* at 153.

85. *See* Young, *supra* note 14, at 1604 ("[T]he jurisprudence of 'big-ideas'—like any other interpretive methodology—can be done well or poorly.").

86. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

87. *See* U.S. CONST. amend. III.

88. *See* U.S. CONST. amend. IV.

invasions 'of the sanctity of a man's home.'"[89] The problem is that this type of privacy, on its face, has little to do with a person's private choice to use, or not to use, contraception.[90] Although Justice Douglas attempts to tie the concepts together by asking rhetorically whether we would "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives,"[91] there simply is no direct fit. Thus, the problem with *Griswold's* structural analysis is that the constitutional principle, though properly derived, is not directly relevant to the issue at hand.

This does not mean, however, that *Griswold* was wrongly decided, or that structural interpretation was inappropriate. There are principles that can be fairly derived from the Constitution to justify the decision in *Griswold*; Justice Douglas merely focused on the wrong theme, or more specifically, too narrow a theme. Later right to privacy cases have shifted their focus to correct this problem. In *Roe* for example, the Court cited *Griswold* as authority for the existence of the right to privacy,[92] but in stating its own rationale eschewed notions of privacy in the Third and Fourth Amendments and instead turned to "the Fourteenth Amendment's concept of personal liberty."[93] The Court continued to move toward a liberty rationale in its reaffirmation of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[94] and most recently in striking down a law criminalizing homosexual sodomy in *Lawrence v. Texas*.[95] In their joint opinion for the Court in *Casey*,

89. *See Griswold*, 381 U.S. at 484 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

90. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 745 n.47 (1989) (noting that *Griswold's* invocation of privacy does not make clear whether it means privacy in the traditional sense, "an interest in keeping certain matters out of public view," or its more substantive sense "an interest in making one's own decisions about certain 'private' matters").

91. *See Griswold*, 381 U.S. at 485.

92. 410 U.S. at 152.

93. *Id.* at 153.

94. 505 U.S. 833, 846–53 (1992).

95. 539 U.S. 558, 567 (2003). Justice Kennedy's move toward a liberty rationale in *Lawrence* is explicit:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice.*

Id. (emphasis added).

Justices O'Connor, Kennedy, and Souter significantly de-emphasized the privacy rationale, reconceptualizing it as an aspect of the broader "liberty" interest[96] protected by the Constitution: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, *are central to the liberty protected by the Fourteenth Amendment.*"[97]

Although neither *Casey* nor *Lawrence* attempts to build the same type of broad structural basis that Justice Douglas sought in *Griswold*, relying instead primarily on the Due Process Clause of the Fourteenth Amendment as the source of the liberty right,[98] structural reasoning continues to play an important role. On its face, the Due Process Clause is not a ground for striking down state statutes; it only ensures that "liberty" not be deprived without "due process of law."[99] The Clause therefore can only impact the statutes at issue in *Casey* and *Lawrence* if it is given extra-textual effect and applied for the principle it represents—liberty or freedom from arbitrary governmental action—rather than its textual command.[100]

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96. *Casey*, 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the cases before us is 'liberty.'").

97. *Id.* at 851 (emphasis added); *see also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 33–37 (2003) (describing the switch from privacy to liberty in *Casey* and *Lawrence*).

98. *See Casey*, 505 U.S. at 846–47, 851; *Lawrence*, 539 U.S. at 573–74. Part of this difference can be attributed to the historical context of the *Griswold* decision. Douglas had been appointed to the Court by Franklin Roosevelt "for the avowed purpose of changing the course of decision on the Court, particularly its hostility toward New Deal economic legislation." Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293, 304 (1986). He had written an opinion proclaiming the end of *Lochner*, and obviously sought to avoid its stigma by locating the right to privacy in the penumbras of the Bill of Rights as opposed to the Due Process Clause. *See id.* at 305.

99. *See* U.S. CONST. amend. XIV, § 1.

100. There are other structural aspects to the cases as well. In *Casey*, for example, the joint opinion, in an attempt to further define the contours of the liberty right, relies on a structural argument first advanced by the second Justice Harlan:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify

Furthermore, there is a much broader constitutional base from which to derive the liberty principle. The Constitution specifically mentions liberty not only in the Fourteenth Amendment,[101] but also in the Fifth Amendment's Due Process Clause[102] and the Preamble,[103] which states that securing "the Blessings of Liberty" is one of the primary goals underlying the whole document. The Constitution's rights-securing provisions[104] are further evidence of the liberty theme, and the Ninth Amendment serves as a reminder that the liberty principle is broader than the rights specifically enumerated.[105] Although the Third and Fourth Amendments do lend support to a broad liberty principle, more apt analogies for the type of liberty at issue in *Griswold* are the freedom of thought implicit in the First Amendment's guarantee of free speech[106] (on which Justice Douglas did, in part, rely[107]), and the liberty of conscience guaranteed by the Free Exercise Clause,[108] involving as they do "intimate and personal choices . . . central to personal dignity and autonomy."[109] Thus, there was a convincing principle to be derived from the Constitution to support the result in *Griswold*, but by focusing too narrowly on the idea of "privacy," Justice Douglas' opinion missed the mark.[110]

Some have argued that this type of reasoning reveals that indeterminacy is an inherent flaw in structural analysis—since the principles that can be derived from the Constitution are often as abstract as "liberty," they do not themselves distinguish between those

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their abridgment.

505 U.S. at 848–49 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (alterations in original)).

101. U.S. CONST. amend. XIV, § 1.

102. U.S. CONST. amend. V.

103. U.S. CONST. pmbl.

104. Primarily located in the Bill of Rights, U.S. CONST. amends., I–VIII, and U.S. CONST. art. I, § 9.

105. U.S. CONST. amend. IX.

106. U.S. CONST. amend. I. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); Abood v. Detroit Bd. of Ed., 431 U.S. 209, 234–35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

107. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

108. *See* U.S. CONST. amend. I.

109. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. at 851.

110. *See Griswold*, 381 U.S. at 484–86.

cases in which they should control and those in which they should not.[111] Professor Black's response to the indeterminacy charge was an unabashed, though more eloquent, admonition that those who live in glass houses should not throw stones. Because his foil was textualism, he focused his argument there, noting that "[t]he precision of textual explication is nothing but specious in the areas that matter."[112] He continued:

> The question is not whether the text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity which marks so many crucial constitutional texts. I submit that the generalities and ambiguities are not greater when one applies the method of reasoning from structure and relation.[113]

Professors Laurence Tribe and Michael Dorf have noted that the same problem can also infect doctrinal and historical interpretations, as the level of generality from which one chooses to view a precedent or tradition will determine whether it can be applied by analogy to future cases.[114] On a certain level, this is a valid response—if some amount of indeterminacy disqualifies a method of interpretation, there may be no acceptable means through which to give substance to the often-vague terms of the Constitution. Textual phrases such as "due process," "equal protection," "regulate Commerce . . . among the several States," and "the freedom of speech," after all, are hardly self-defining, to say nothing of truly indeterminate provisions such as the Ninth and Tenth Amendments.

Another defense is available, however, and one that commends the virtues of structural analysis as opposed to simply casting aspersions on other methods of interpretation. Because it involves the application of principles derived *from the text of the Constitution*, structuralism

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111. *See* Young, *supra* note 14, at 1636–37 ("[Professor] Black's ability time and again to justify morally appealing results on structural grounds might, after a while, give rise to the suspicion that a sufficiently skillful structuralist can justify any result he pleases."); BOBBITT, *supra* note 5, at 84–85 ("Structural arguments are sometimes accused of being indeterminate because while we can all agree on the presence of the various structures, we fall to bickering when called upon to decide whether a particular result is necessarily inferred from their relationships.").

112. *See* BLACK, *supra* note 4, at 29.

113. *Id.* at 30–31.

114. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1062–63, 1065–67 (1990).

contains within itself a means of limitation.[115] Only themes and principles that can be fairly derived from the text are available to the conscientious structuralist. For example, liberty may seem like a very broad principle at first glance, but upon closer inspection it is clear that the Constitution does not, indeed cannot, be read to support a broad right of freedom from any and all government intrusions. After all, the Constitution affirmatively grants the federal government power in certain areas[116] and assumes that the state governments retain significant authority in others.[117] The key is to look to the liberty securing provisions of the Constitution to determine what the principle can be said to protect. As Justice Harlan stated in dissent in *Poe v. Ullman*,[118]

> "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum . . . which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[119]

By analogizing to rights specifically secured by the text of the Constitution, one can begin to distinguish between the types of cases where the liberty principle will control, and those in which it will not. For example, the Constitution's rights-securing provisions do not evidence a significant concern for the type of "economic liberty" that the Court notoriously protected in *Lochner v. New York*.[120] On the other hand, as discussed above, cases like *Griswold* and *Lawrence* fall

115. *See* Reynolds, *supra* note 13, at 1346 ("Penumbral reasoning, precisely because it ties the development of new principles to the overall structure and purposes of the Constitution, probably is less likely to create truly unwarranted or unacceptable results than many other approaches.").

116. *See* U.S. CONST. art. I, § 8.

117. *See* U.S. CONST. amend. X.

118. 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

119. *Id.* at 543. The majority of the Court has since invoked Justice Harlan's theory in other fundamental rights cases. *See, e.g.*, Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 848 (1992); Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (holding single family home ordinance that prevented grandmother from living with son, grandson, and another grandson that was a cousin of first, unconstitutional).

120. 198 U.S. 45 (1905). *But see* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253–69 (2004) (arguing that the Constitution should be interpreted to include a broad presumption of liberty, including economic liberty).

much closer to the core values protected by certain parts of the First Amendment. Admittedly, these are still hard cases about which reasonable minds may differ, but disagreement in difficult cases is not new, and it is not unique to structural analysis.[121]

Though structural analysis must admit to a certain level of indeterminacy, this cannot be fatal to its use as an interpretive tool. Indeterminacy plagues other methods of interpretation as well, and likely cannot be completely avoided in any process of judgment. Moreover, because it is tied to the text of the Constitution, structural analysis is also inherently self-limiting, confining its indeterminacy to the margins. This inherent limit saves structuralism from the charge that it grants interpreters boundless discretion, and is one of two key features that legitimate its use as a tool of constitutional interpretation.

III. WHY STRUCTURALISM IS LEGITIMATE: BALANCING TWO FUNDAMENTAL TENETS OF WRITTEN CONSTITUTIONALISM

Before turning to a critical analysis of the modern Supreme Court's use of structural reasoning in federalism cases, one final question needs to be asked about the methodology generally: why is it that structural reasoning is so common, or, to ask the question in a more probing way, what makes structural reasoning legitimate? For some, the Court's long pattern of structural interpretation is itself sufficient to answer the legitimacy question.[122] It is certainly true that throwing out structural interpretation at this point would mean wiping the slate clean in any number of areas, and there is, of course, value in preserving stability in constitutional law.[123] This approach, however, attempts to answer the question without ever really addressing it, and can only legitimize past uses of structural interpretation, not its continued use.[124]

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121. *See* BOBBITT, *supra* note 5, at 85 ("If we don't agree in the hard cases, that is nothing new; and perhaps being forced to make the process explicit, we will sharpen our senses and eventually achieve a greater coherence.").

122. *See* Christopher Chrisman, Note, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 456–57 (2001).

123. *See* Amar, *supra* note 13, at 54 (discussing generally the benefits of textual (or documentarian) analysis over doctrinal analysis, but admitting that "pragmatic documentarians may at times be obliged to yield to deeply entrenched and widely accepted practices"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 744–46 (1988) (concluding that his preferred originalism must sometimes yield to stare decisis). *See also Casey*, 505 U.S. at 854–69 (relying in part on stare decisis to reaffirm the essential holding of *Roe v. Wade*).

124. *Cf.* Monaghan, *supra* note 123, at 759 (noting that stare decisis may be a legitimate

A better justification for structural reasoning is its unique ability to balance two fundamental, but seemingly contradictory, tenets of constitutionalism—that the Constitution must be flexible enough to apply across time to unforeseen circumstances, and that we must adhere to the text of the Constitution.[125] As with many of our basic premises in constitutional law, each finds its roots in the opinions of former Chief Justice John Marshall. The first is ably expressed in the following passage from *McCulloch v. Maryland*:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a *constitution* we are expounding.[126]

Put another way, a constitution cannot be written to answer every constitutional question. Myriad commentators have addressed this point. Professor Philip Bobbitt, for example, has described what he calls a "constitutional sense," a feeling that a question has constitutional implications even where there is no obviously controlling textual provision.[127] Seen through this lens, the Constitution's more open-ended provisions, such as the Ninth Amendment,[128] begin to look like textual invitations to engage in some form of nontextual analysis.[129]

Structural analysis fits well with this important aspect of

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basis for preserving precedent, but not for extending it).

125. *See* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 239 (2001) (noting "enduring debates between the idea that a written constitution is intended to be rigid and constraining, on the one hand, and that a good constitution is intended to be flexible and empowering, on the other.").

126. 17 U.S. (1 Wheat.) 316, 407 (1819).

127. *See* BOBBITT, *supra* note 5, at 85. *See also, e.g.*, POSNER, *supra* note 81, at 328 (noting that the Constitution contains gaps, and that the Court, perhaps, should attempt to fill the most glaring ones).

128. *See* U.S. CONST. amend. IX.

129. *See* Young, *supra* note 14, at 1628 (noting that the Guarantee Clause may be a "textual mandate for structural argument" (emphasis removed)).

constitutionalism; themes and principles derived from the text can be applied to questions that alert our constitutional sense. For Professor Black, this was the primary virtue of structural analysis: "I think well of [structure and relation], above all, because to succeed it has to make sense—current, practical sense."[130] Others have trumpeted this benefit as well.[131] For example, Brandon Denning and Professor Glenn Harlan Reynolds have argued that a primary benefit of structural reasoning is that it "can help clean up the 'inkblot' problem posed by puzzling constitutional provisions, like the Ninth and Tenth Amendments" and "to vindicate principles that 'everyone knows' informed the Constitution, but are nowhere mentioned explicitly."[132] The expansive virtue of structuralism, however, is only half the story. After all, any interpretive methodology that does not rely solely on explicit textual commands can make the same claim. Historical arguments, for example, can also be used to fill in perceived gaps in the Constitution's text.[133]

What is unique about structural arguments is that they adhere to a second fundamental tenet of constitutionalism, this one rooted in Chief Justice Marshall's other great opinion, *Marbury v. Madison*:

> This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.
>
> The government of the United States is of the latter description. The powers of the legislature are defined, and limited; *and that those limits may not be mistaken, or forgotten, the constitution is written.* To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?[134]

By focusing on the importance of the Constitution as a *written*

130. BLACK, *supra* note 4, at 22.

131. *See, e.g.*, Jackson, *supra* note 13, at 1282–83 ("Like Black, I believe that attention to basic structures of constitutional relationships is a powerful interpretive tool, not least because of its appeal to a shared 'constitutional sense.'") (citations omitted).

132. Denning & Reynolds, *supra* note 32, at 1119.

133. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (writing for a plurality of the Court, Justice Scalia applied a "traditionally protected by our society" test to determine whether unenumerated rights warranted constitutional protection).

134. 5 U.S. (1 Cranch) at 176 (emphasis added).

document, Marshall makes the claim that adherence to the text is of primary importance. Though not strictly "textual," structural arguments are derived from the text, and therefore embody this aspect of constitutionalism as well. It should not be surprising then, that adherence to the text is also a virtue of structuralism trumpeted by Professor Black and others.[135] The unique virtue of structuralism, and, I would submit, the principle that legitimizes its use as a tool for interpreting the Constitution, is its ability to bring these two seemingly contradictory aspects of constitutionalism together.[136]

It is worth pausing here to note a perhaps obvious consequence of this argument—any theme or principle applied in a structural analysis must be derived from the text of the Constitution itself. Extra-constitutional principles derived from other sources are not related to the text, and therefore cannot achieve the same balance between these competing constitutional visions. To take one example, Professor Ernest Young has noted a type of argument he calls "big ideas" structuralism.[137] Big ideas analysis is similar to the structuralism I have described in that it involves the application of general principles to resolve specific constitutional questions, but it "diverges from Professor Black by emphasizing the historical understanding of the Constitution's structure."[138] In other words, as opposed to building its principles from the text of the Constitution, it superimposes principles derived from a historical analysis. Because big ideas, or historical, structural analysis applies principles from outside the Constitution's text, it cannot achieve the same balance that justifies its text-based cousin. This is not to say that the historical structural analysis noted by Professor Young is illegitimate. History, like text and structure, certainly has a role to play in balanced constitutional interpretation.[139] The point is that

135. *See* BLACK, *supra* note 4, at 31 ("There is, moreover, a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."); *see also, e.g.*, Reynolds, *supra* note 13 at 1346 ("Penumbral reasoning, precisely because it ties the development of new principles to the overall structure and purposes of the Constitution, probably is less likely to create truly unwarranted or unacceptable results than many other approaches.").

136. *See* Denning & Reynolds, *supra* note 32, at 1119 (noting that the "constant reemergence" of structural interpretation, or in their nomenclature, "penumbral reasoning," suggests that it must play a "vital role" in its ability to "mediate between the need to root constitutional decisions in the text of the Constitution, and the frank realization that the Framers did not—and could not—provide answers to all of our interpretive questions.").

137. Young, *supra* note 14, at 1603.

138. *Id.* at 1639.

139. *See generally* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of*

"structural" arguments not based on principles derived from the text must find their legitimacy elsewhere.[140]

IV. STRUCTURAL INTERPRETATION IN MODERN FEDERALISM JURISPRUDENCE: THE COMPETING THEMES OF STATE SOVEREIGNTY AND FEDERAL SUPREMACY

One of the dominant trends in the jurisprudence of the Rehnquist Court over the last ten to fifteen years has been a reinvigoration of constraints on national power, undertaken in the name of federalism.[141] This body of law, termed both the "new federalism"[142] and the "federalist revival,"[143] cuts across multiple cases and contexts, but at its core involves three distinct doctrinal areas: the anticommandeering rule,[144] limitations on the exercise of Congress's enumerated powers (especially under the Commerce Clause),[145] and state sovereign immunity.[146] As many commentators have noted, the new federalism

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Constitutional Interpretation, 100 HARV. L. REV. 1189 (1987) (asserting that many types of arguments, including historical arguments, can and should be blended together into coherent interpretations of the Constitution).

140. Professor Young provides a compelling argument for the legitimacy of historical structural analysis by tying it to Professor Lawrence Lessig's innovative "translation" theory. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1263 (1993) (summarizing the model of fidelity in translation). In the words of Professor Young:

> [T]he institutional environment created by the Constitution has changed fundamentally over the course of our history, often without any corresponding change in the constitutional text. "Translation" seeks to maintain fidelity to the presuppositions of the original constitutional structure in the changed institutional context. "Big ideas" structuralism is useful for these purposes because the "big ideas" at the heart of the approach are typically integral to the presuppositions that the interpreter is seeking to maintain.

Young, *supra* note 14, at 1654 (internal citations omitted).

141. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2181 (1998) ("The constitutional law of federalism-based constraints on the federal government has risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power."); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27 (1998).

142. *See, e.g.*, Thomas O. Sargentich, *The Rehnquist Court and State Sovereignty: Limitations of the New Federalism*, 12 WIDENER L.J. 459, 460 (2003) (describing the "new federalism" as encompassing four doctrinal areas: limits on the commerce power, the Tenth Amendment, sovereign immunity, and limitations on Section 5 of the Fourteenth Amendment).

143. *See* Jackson, *supra* note 141, at 2181–82 (discussing "the Court's recent federalist revival").

144. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992).

145. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

146. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

cases often rely heavily on structural reasoning.[147] This fact alone should not be surprising; the Court commonly employs structural reasoning in a variety of areas, and federalism cases are no exception. In 1934, for example, the Court explicitly relied on "postulates which limit and control" found "[b]ehind the words of" Article Three and the Eleventh Amendment, to hold that states are immune from suit in federal court by foreign governments absent their consent.[148] *McCulloch v. Maryland*,[149] of course, is another prominent example.

What is interesting about the use of structural reasoning in the new federalism cases is that it is often employed by both the majority and the dissent to reach very different conclusions. In a recurring argument reminiscent of early Federalist/Republican debates between Alexander Hamilton and Thomas Jefferson,[150] the majority has relied on a state sovereignty principle to reach pro-state outcomes, and the dissenters turn to a federal supremacy theme and come out the other way. This conflict begs an obvious and important question—which side has the better structural argument? Before turning to that question, however, it is necessary to take a closer look at the competing sides.

A. New Federalism's Prequel: The State Sovereignty/Federal Supremacy Debate in Regulatory Immunity Cases

The sovereignty/supremacy debate first played out (in the modern Court) in a well-known trio of cases in which the Supreme Court twice reversed itself over the issue of Congress's power to directly regulate states pursuant to the Commerce Clause. In the first case, *Maryland v. Wirtz*,[151] the Court held that Congress could apply the Fair Labor Standards Act ("FLSA") to the states.[152] Although the majority hinted at a federal supremacy theme underlying its decision,[153] the opinion was

147. *See, e.g.*, Jackson, *supra* note 13, at 1274 (describing the Court's approach in "defining immunities of the states" as "structural and holistic"); Tribe, *supra* note 12, at 138 (describing the use of "structural inference" in new federalism cases).

148. *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

149. 17 U.S. (1 Wheat.) 316, 316 (1819).

150. *See* J. M. Balkin, Review Essay, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 923–24 (1988) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) (discussing early debates about the "relative powers of the states and the federal government").

151. 392 U.S. 183 (1968).

152. The provisions of the FLSA that were challenged in *Wirtz* applied general minimum wage and overtime rules to a particular subset of state employees, specifically certain employees of hospitals, institutions, and schools. *Id.* at 186–87.

153. *Id.* at 195–96 ("[I]t is clear that the Federal Government, when acting within a

mostly pragmatic and textual in tone, and was not explicitly structural. The dissent, however, relied heavily on a particular structural argument that would become a mainstay of the majority opinions in the new federalism cases.[154] Justice Douglas, writing for himself and Justice Stewart, derived a general principle of state sovereignty from the Tenth Amendment:

> But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.[155]
>
> . . . .
>
> If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment.[156]

Of course, the text of the Tenth Amendment contains no general rule against congressional regulation of states, and nowhere mentions the phrase "state sovereignty."[157] Because Justice Douglas cast the argument in structural terms, however, the specific textual rule was secondary. Instead, similar to Chief Justice Marshall's extra-textual invocation of the Supremacy Clause in *McCulloch*,[158] he interpreted the Tenth Amendment as embodying a broad principle of state sovereignty. Douglas then applied the state sovereignty principle directly, and determined that it prohibited Congress from imposing the FLSA's employment rules on states.

Eight years after the decision in *Wirtz*, the Court revisited the question of Congress's power to apply the FLSA to the states in *National League of Cities v. Usery*.[159] In an opinion relying heavily on

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delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character"; "federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants.'") (citations omitted).

154. *Id.* at 201–05 (Douglas, J., dissenting).

155. *Id.* at 201.

156. *Id.* at 205.

157. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

158. *See* the discussion of *McCulloch* and extra-textual effect, *supra* notes 52–60 and accompanying text.

159. 426 U.S. 833 (1976).

the extra-textual effect of the Tenth Amendment,[160] then-Justice Rehnquist adopted Justice Douglas' state sovereignty theory.[161] Expressly overruling *Wirtz*,[162] the Court held that Congress could not apply the FLSA's employment rules against states in "areas of traditional governmental functions."[163] Justice Brennan dissented from the Court's decision, relying in large part on his own structural argument—that the principle of federal supremacy embedded within the Constitution precludes state regulatory immunity.[164] To establish this countervailing principle, Justice Brennan relied on former Chief Justice Marshall's extra-textual invocation of the Supremacy Clause in *McCulloch*, quoting:

> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all . . . and acts for all. . . . The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."[165]

Quoting another source, Justice Brennan continued: "'[It] is not a controversy between equals' when the Federal Government 'is asserting its sovereign power to regulate commerce. . . . [T]he interests of the nation are more important than those of any state.'"[166] Because he

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160. *See, e.g.*, *id.* at 842. Regarding the Tenth Amendment, Justice Rehnquist stated:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

Id. (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (citations omitted)).

161. *Id.* at 852.

162. *See id.* at 855.

163. *See id.* at 852.

164. *Id.* at 859 (Brennan, J., dissenting).

165. *Id.* (Brennan, J., dissenting) (quoting McCulloch v. Maryland, 5 U.S. (1 Cranch) 316, 405–06 (1819)) (internal citations omitted).

166. *Id.* (quoting Sanitary Dist. v. United States, 266 U.S. 405 425–26 (1925)). Justice Brennan also relied on Alexander Hamilton's *Federalist No. 31*, which stated:

relied on the federal supremacy theme as controlling, Justice Brennan concluded that Congress could apply the FLSA to the states:

> "[W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[167]

Justice Brennan's opinion foreshadowed the later new federalism cases in two important ways. First, his federal supremacy principle forms the basis of structural arguments often raised in dissenting opinions in the new federalism cases. Second, though he was willing to give extra-textual effect to the Supremacy Clause to derive a broad federal supremacy theme, he was unwilling to credit the possibility that a similar interpretation of the Tenth Amendment was possible. Instead, he took the majority to task for applying that provision beyond its clear textual mandate, which merely says that states retain those powers not granted to the federal government by the Constitution.[168] This striking contrast to the Court's holistic structural approach in cases like *Youngstown*[169] is a recurring feature of the new federalism.

In 1985, nine years after *National League of Cities*, and just seventeen years after it had first addressed the issue in *Wirtz*, the Court once again reversed itself as to whether the FLSA could be applied to the states in *Garcia v. San Antonio Metropolitan Transit Authority*.[170] Although Justice Blackmun's opinion for the Court is best known for its reliance on the political protections of states built into the organization of the federal government,[171] he also relied on the federal supremacy

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> A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people.

Id. at 857 n.1 (quoting THE FEDERALIST NO. 31 (Alexander Hamilton)).

167. *Id.* at 861 (quoting *Wirtz*, 392 U.S. at 196–97).

168. *Id.* at 861–62.

169. 343 U.S. at 587–88. *See generally supra* notes 56–73 and accompanying text.

170. 469 U.S. 528 (1985).

171. For example, two Senators from each state, and the Electoral College. *See id.* at 550–57. Essentially, Justice Blackmun argued that the sovereignty of the states was adequately protected by their representation in the national political process. He noted for

principle that Justice Brennan had championed in his *National League of Cities* dissent. In fact, Justice Blackmun began his analysis by noting that the "sovereignty of the States is limited by the Constitution itself,"[172] and concluded that although the states retain "a significant measure of sovereign authority' . . ., [t]hey do so . . . only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[173] He continued:

> In the words of James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."[174]

In two separate dissenting opinions, both Justice Rehnquist[175] and Justice O'Connor[176] predicted that *Garcia*, and its federal supremacy

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example, that the states "were given . . . influence in the Senate, where each State received equal representation," *id.* at 551, and also relied on other indirect influences on the legislative and executive branches, such as their "control of electoral qualifications and their role in Presidential elections." *Id.* Due to these limitations, he concluded that independent rules based on the principle of state sovereignty were both unnecessary and unwarranted. Interestingly, Justice Blackmun had joined the majority opinion in *National League of Cities*, though he limited his concurrence in a separate opinion. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

172. *Garcia*, 469 U.S. at 548. Justice Blackmun wrote:

> [T]he sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.

Id. (internal citations omitted).

173. *Id.* at 549 (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

174. *Id.* (internal citations omitted).

175. *See id.* at 580 (Rehnquist, J., dissenting). Justice Rehnquist wrote:

> But under any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

Id. (Rehnquist, J., dissenting).

176. *See id.* at 589 ("I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will in time again

theme, would eventually be pushed aside by the principle of state sovereignty.[177] *Garcia* itself has not been overturned,[178] but these assertions have nonetheless proved prescient. Although the federal government has the power to impose at least some regulation on the states, the new federalism cases have minimized this ability in a variety of ways—all in the name of state sovereignty.

B. Sovereignty and Supremacy in the Anticommandeering Cases

The cornerstone of the new federalism jurisprudence was laid in *New York v. United States*[179] in 1992. The 1985 amendments to the Low-Level Radioactive Waste Policy Act[180] included provisions intended to encourage states to develop strategies for effective disposal of low-level radioactive waste.[181] One of these, known as the "take title provision," required states either to "regulat[e] pursuant to Congress'[s] direction" or to "tak[e] title to and possession of the low level radioactive waste generated within their borders."[182] The Court held that this provision was unconstitutional because it "commandeered" state legislatures by forcing the state to act in accordance with a congressional mandate.[183] Although Justice O'Connor's opinion for the Court relied mainly on precedent for its "anticommandeering" rule,[184] she also supported her conclusion by arguing that commandeering violated a general principle of state sovereignty: "Whether one views the take title provision as lying

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assume its constitutional responsibility.") (O'Connor, J., dissenting).

177. In the primary dissent, Justice Powell returned to the same state sovereignty principle that had been invoked by Justices Douglas and Rehnquist before him, and concluded that the federal government should not be permitted to impose the FLSA's labor regulations on state employment practices. 469 U.S. at 573–75 (Powell, J., dissenting).

178. One recent case demonstrates that, given the protection of state sovereignty afforded by the new federalism doctrines, Justice O'Connor has perhaps backed away from the position that *Garcia* itself should be overruled. In *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), the Court, per Justice O'Connor, held that state sovereign immunity was not constitutionally entitled to full faith and credit in the courts of sister states. In rejecting a proposed rule that would provide immunity where "core sovereign responsibilities" are implicated, Justice O'Connor cited to *Garcia* as support for the proposition that such a rule would be "unsound in principle and unworkable in practice." *See id.* at 498 (quoting *Garcia*, 469 U.S. at 546–47).

179. 505 U.S. 144 (1992).

180. 42 U.S.C. § 2021e.

181. Two of these provisions, which the Court characterized as providing "incentives" to regulate, were held to be constitutionally permissible. *See New York*, 505 U.S. at 171–74.

182. *See id.* at 174–75.

183. *Id.*

184. *See id.* at 174 (citing Hodel v. Va. Surface Mining & Reclamation Assn., 452 U.S. 264, 288 (1981), and FERC v. Mississippi, 456 U.S. 742, 764–65 (1982)).

outside Congress'[s] enumerated powers, or as infringing upon the core of the state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution."[185]

The sovereignty/supremacy debate boiled much closer to the surface in the Court's second anticommandeering case, *Printz v. United States*.[186] *Printz* involved a challenge to the interim provisions of the Brady Act,[187] which required state and local law enforcement officers to conduct background checks on gun purchasers until the Attorney General could establish a national system.[188] Justice Scalia's opinion for the Court succinctly framed the issue: "Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional."[189]

After examining the issue from a historical perspective, Justice Scalia turned explicitly to structural analysis, stating: "We turn next to consideration of the structure of the Constitution, to see if we can discern among its 'essential postulate[s],' a principle that controls the present case."[190] Of course, the principle he focused on was state sovereignty. In an analysis reminiscent of Justice Douglas' *Griswold* opinion,[191] Justice Scalia built a broad base for the state sovereignty

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185. *Id.* at 177. There are other examples of state sovereignty structural reasoning in *New York* as well. For instance, Justice O'Connor directly addressed the extra-textual effect of the Tenth Amendment:

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

See id. at 156–57.

186. 521 U.S. 898 (1997).

187. 18 U.S.C. § 922(s) (2004).

188. *See Printz*, 521 U.S. at 902–03.

189. *Id.* at 905.

190. *Id.* at 918 (quoting Monaco v. Mississippi, 292 U.S. 313, 322 (1934)) (citations omitted).

191. Several scholars have noted the methodological similarities between *Griswold* and the new federalism cases. *See, e.g.*, Tribe, *supra* note 12, at 170–72 (noting the similarity in reasoning between federalism cases and individual rights cases such as *Griswold*); Denning & Reynolds, *supra* note 32, at 1090 ("The 1995–96 and 1996–97 Terms produced several decisions that illustrated the extent to which the 'conservative' Rehnquist Court has adopted interpretive methodologies that, ten or twenty years ago, would have been anathema to self-

principle by pulling together several related and unrelated constitutional provisions in which it plays a role:

> Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty." This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights." Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[192]

One incident of this principle, Justice Scalia's opinion reasoned, was that the Constitution establishes "'two orders of government, each with its own direct relationship, its own privity . . . to the people who sustain it and are governed by it.'"[193] Because each government is accountable to its citizens directly, allowing the federal government to commandeer state executive officials blurs that line and eviscerates the separate nature of the two sovereignties.[194]

Relying on these and other arguments, the Court held that the federal government could not command state executive officials to enforce federal laws.[195] Justice Stevens (joined by Justices Souter,

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respecting 'strict constructionists.' In short, conservatives on the Court have embraced what has been termed 'penumbral reasoning,' of the sort employed in *Griswold v. Connecticut.*") (citations omitted).

192. 521 U.S. at 918–19 (alteration in original) (citations omitted).

193. *Id.* at 920 (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

194. *See id.* at 920–21.

195. *See id.* at 935 ("The Federal Government may neither issue directives requiring the

Ginsburg, and Breyer) dissented,[196] countering in part with federal supremacy structural arguments. He first employed the federal supremacy principle to rebut the claim that commandeering would create conflicts for state officials bound to state governments and state constituencies.[197] Invoking the Supremacy Clause in conjunction with the Oath Clause, which requires that state executive and judicial officers "be bound by Oath or Affirmation, to support [the] Constitution,"[198] Justice Stevens argued:

> There can be no conflict between their duties to the State and those owed to the Federal Government because Article VI unambiguously provides that federal law "shall be the supreme Law of the Land," binding in every State. . . . Thus, not only the Constitution, but every law enacted by Congress as well, establishes policy for the States just as firmly as do laws enacted by state legislatures.[199]

Justice Stevens once again relied on the extra-textual effect of the Supremacy Clause in a later argument about the applicability of the Court's decision in *Testa v. Katt*.[200] The *Testa* Court held that a state court of competent jurisdiction cannot refuse to hear a claim brought under a federal statute.[201] The majority reasoned that *Testa* was distinguishable because it was mandated by the clear text of the Supremacy Clause, which states, "'the Judges in every State Shall be bound [by federal law].'"[202] Justice Stevens, however, argued that the Supremacy Clause stands for "far more" than its express "conflict of laws principle."[203] In his opinion, *Testa* relied "on the central message of the entire [Supremacy] Clause,"[204] and the same principle should be applied to state executive officials.

In the debate over *Testa* and the breadth of the Supremacy Clause, Justice Stevens wanted to give the Supremacy Clause extra-textual

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States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

196. *See id.* at 939–70 (Stevens, J., dissenting).

197. *See id.* (Stevens, J., dissenting).

198. *See* U.S. CONST. art. VI, cl. 3.

199. *Printz*, 521 U.S. at 943–44 (Stevens, J., dissenting).

200. 330 U.S. 386 (1947).

201. *Id.* at 394.

202. *See Printz*, 521 U.S. at 928–29 (alteration in original).

203. *Id.* at 968 (Stevens, J., dissenting).

204. *Id.* at 969.

effect, but the majority chose to confine it to its literal terms. Of course, the positions of the two sides were reversed as to the Tenth Amendment. As noted above, Justice Scalia applied it as evocative of a general principle of state sovereignty, but Justice Stevens, for his part, preferred a literal interpretation:

> Unlike the First Amendment . . . the Tenth Amendment imposes no restriction on the exercise of delegated powers. . . . The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress.[205]

Thus, the pattern that emerged in the regulatory immunity cases was repeated in the anticommandeering cases. Each side relied on structural reasoning, and each focused on one constitutional principle while refusing to credit the one posed by the other side.

C. The Supporting Role of Sovereignty and Supremacy in Defining the Scope of the Commerce Clause

The second important development of the new federalism has been a renewed search for judicially enforceable outer limits on congressional power. In a trio of cases in the late 1930's and early 1940's,[206] the Court retreated from a long struggle to enforce limits on Congress's power under the Commerce Clause.[207] Abandoning distinctions between commercial and noncommercial activity,[208] and direct and indirect effects on interstate commerce,[209] the Court finally concluded that Congress could regulate any activity that, in the aggregate, had a "substantial effect" on interstate commerce.[210] Applying this principle, the Court upheld a wide range of statutes over the next fifty years, including, for example, congressional regulation of racial discrimination in places of public accommodation[211] and purely local incidents of loan sharking.[212]

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205. *Id.* at 941–42 (citations omitted).

206. *See* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

207. *See* U.S. CONST. art. I, § 8, cl. 3.

208. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

209. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935).

210. *See Wickard*, 317 U.S. at 125.

211. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–53 (1964);

In its 1995 decision in *United States v. Lopez*,[213] and its 2000 decision in *United States v. Morrison*,[214] however, the Rehnquist Court interjected a new limiting principle into Commerce Clause interpretation. Building from the axiom that "enumeration presupposes something not enumerated,"[215] and reasoning that the prior substantial effects cases all involved, in some sense, economic activity, the Court held that Congress may only regulate *economic activity* that has a substantial effect on interstate commerce.[216] Under this rule, it struck down a federal law prohibiting the possession of guns near schools in *Lopez*,[217] and a federal law providing a private right of action to victims of gender motivated violence in *Morrison*.[218]

Although most of the arguments in *Lopez* and *Morrison* are either textual or doctrinal, the state sovereignty structural argument once again played a key role in the discussion. In both cases the Court argued that a broad theory of substantial effects would allow Congress to regulate virtually everything, and that such a result would be incompatible with "our dual system of government."[219] For example, writing for the Court in *Morrison*, Chief Justice Rehnquist stated:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.... Indeed, we can think of no better example of the police power, which the Founders denied the

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Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964).

212. *See* Perez v. United States, 402 U.S. 146, 155–56 (1971).

213. 514 U.S. 549 (1995).

214. 529 U.S. 598 (2000).

215. *See* Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1, 195 (1824).

216. *See Morrison*, 529 U.S. at 607–11.

217. 514 U.S. at 559–68.

218. 529 U.S. at 610–19. The Court recently heard arguments in a case that will likely further define the scope of the Commerce Power. *See* Ashcroft v. Raich, 124 S.Ct. 2909 (2004) (granting the government's petition for certiorari). The Court will determine whether Congress has the power to regulate individually cultivated and consumed marijuana, where expressly permitted under state law for medicinal use. The Ninth Circuit ruled at the preliminary injunction stage that such regulation was beyond the reach of the Commerce Clause. Raich v. Ashcroft, 352 F.3d 1222, 1227–34 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004).

219. 529 U.S. at 608 n.3 ("this Court has always recognized a limit on the commerce power inherent in 'our dual system of government'") (quoting NLRB v. Jones & Laughlin Steel Corp., 310 U.S. 1, 37 (1937)); *Lopez*, 514 U.S. at 557.

> National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[220]

Responding to challenges from the dissenting justices, Chief Justice Rehnquist defended this position by arguing that it was implied from "the entire structure of the Constitution:"[221] "With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."[222]

Like the majority opinions, the dissents in *Lopez* and *Morrison* primarily rely on textual and doctrinal (as well as practical) arguments. Nonetheless, at important points in their arguments, the dissenters turned to the federal supremacy principle to help support their position. For example, the dissenters invoked federal supremacy structuralism in response to the majority's argument that Congress should not be allowed to regulate in areas of traditional state concern.[223] Echoing earlier reasoning in the regulatory immunity and anticommandeering cases, Justice Souter argued in his *Morrison* dissent that, under the principle of federal supremacy, Congress can regulate in any area encompassed within the Commerce Clause:

> The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. . . .[224]
>
> . . . .
>
> To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police

220. *Morrison*, 529 U.S. at 617–18 (citations omitted).

221. *Id.* at 618 n.8.

222. *Id.* For other examples of the sovereignty principle at work in *Lopez*, see 514 U.S. at 561 n.3, 564, and Justice Kennedy's concurring opinion, 514 U.S. at 568–83 (Kennedy, J., concurring). For similar examples in *Morrison*, see 529 U.S. at 608, 613, 615–16.

223. In both *Lopez*, 514 U.S. at 564, and *Morrison*, 529 U.S. at 615–16, the majority invokes the idea that there are areas of traditional state concern and that federal regulation in such contexts is inherently suspect.

224. 529 U.S. at 639 (Souter, J., dissenting).

power, in such cases federal authority is supreme.[225]

Thus, even in these cases, where the battle was fought primarily through other types of arguments, the dispute about the structure of federalism—state sovereignty or federal supremacy—played an important role.[226]

D. Structural Reasoning in the State Sovereign Immunity Cases

The sovereignty/supremacy debate has played its greatest role in the final important doctrinal development of the new federalism, the state sovereign immunity cases. The history of the state sovereign immunity doctrine is long and complicated, and a full recitation is well beyond the scope of this analysis.[227] However, in order to appreciate the structural aspects of the modern sovereign immunity cases, it is important to have some idea of what came before.

The story begins in earnest with the Supreme Court's 1793 decision in *Chisholm v. Georgia*.[228] In *Chisholm*, a South Carolina citizen sued Georgia in federal court, invoking the diversity jurisdiction of Article III to bring a state law assumpsit action.[229] The Court found that Georgia was not immune from such a suit in federal court because the plain language of Article III[230] provided for federal jurisdiction.[231] *Chisholm*

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225. *Id.* at 639 n.12 (internal citations omitted); *see also Lopez*, 514 U.S. at 609–10. Justice Souter advanced a similar argument in *Lopez*:

> There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.... [I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests.

Lopez, 514 U.S. at 609–10 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 195–96 (1968) (altertions in original) (internal citations omitted)).

226. In another aspect of the new federalism, the Rehnquist Court has also imposed limits on Congress's ability to legislate pursuant to its other enumerated powers. For example, in both *City of Boerne v. Flores*, 521 U.S. 507, 530–36 (1997) and *Morrison*, 529 U.S. at 619–27, the Court enforced limits on Congress's ability to legislate pursuant to § 5 of the Fourteenth Amendment.

227. For a concise history of the development of the state sovereign immunity doctrine, see Ginger R. Burton, Note, *Piercing the State Sovereign Immunity Shield: Utilizing Suit by the United States on Behalf of Individuals to Provide the Complete Remedy for States' Violation of Federal Laws Enacted Under Article I*, 37 GA. L. REV. 1401, 1410–22 (2003).

228. 2 U.S. (1 Dall.) 419 (1793).

229. *Id.*

230. Article III states, in relevant part: "The judicial Power shall extend... to Controversies... between a State and Citizens of another State." *See* U.S. CONST. art. III, §

created a swirl of controversy,[232] and in response Congress soon proposed, and the states quickly ratified, the Eleventh Amendment, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[233]

Although the text of the Eleventh Amendment is limited to suits brought against one state by a citizen of another, and thus is best read textually as a limit on the diversity jurisdiction of the federal courts,[234] the Amendment was given life well beyond the reach of its text in *Hans v. Louisiana*,[235] decided in 1890. Relying in part on the now familiar principle of state sovereignty, the *Hans* Court found that the Eleventh Amendment had restored a general rule of state sovereign immunity, and therefore barred a federal question suit against Louisiana by a Louisiana citizen.[236]

The Court revisited the sovereign immunity doctrine in a pair of cases a century later by asking a slightly different question—whether Congress has the power to abrogate state sovereign immunity through legislation. The Court first addressed abrogation in the context of Congress's power pursuant to section five of the Fourteenth

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2, cl. 1.

231. *See Chisholm*, 2 U.S. (1 Dall.) at 466 ("'The judicial power of the United States shall extend to controversies, between a state and citizens of another State.' Could the strictest legal language . . . describe, with more precise accuracy, the cause now depending before the tribunal?") (opinion of Wilson, J.) (emphasis omitted) (citations omitted).

232. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890).

233. U.S. CONST. amend. XI.

234. A point acknowledged by many commentators and Supreme Court Justices alike. *See, e.g.*, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1335 (1983); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 10–13 (1996); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) ("[T]he text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts . . . .") (Rehnquist, J.); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 286–89 (1985) (Brennan, J., dissenting).

235. 134 U.S. at 13–15.

236. *Id.* at 13. The Court stated in *Hans*:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

Id. (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)) (emphasis omitted).

Amendment, which grants authority to enforce the Amendment's substantive provisions, such as the Equal Protection and Due Process Clauses.[237] Writing for the Court in *Fitzpatrick v. Bitzer*,[238] then-Justice Rehnquist held that, when legislating pursuant to section five of the Fourteenth Amendment, Congress could abrogate state sovereign immunity and make states liable in damages to individuals for violations of federal law. To reach that conclusion, he relied heavily on the effect of the Fourteenth Amendment on the "relationship between the Federal Government and the States."[239] The Fourteenth Amendment, he reasoned, was "'intended to be'" a limit on "'the power of the States'" and an enlargement "'of the power of Congress.'"[240] He continued, quoting the Court's decision in *Ex parte Virginia*:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action. . . . Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.[241]

Fitzpatrick therefore relies on a particular application of the federal supremacy principle, derived not from the Supremacy Clause or the Constitution generally, but from the Fourteenth Amendment's direct limitations on state sovereignty and its empowerment of Congress to enforce those limits.[242]

Thirteen years later, in *Pennsylvania v. Union Gas Co.*,[243] the Court extended the abrogation rule to Congress's power under the Commerce Clause. Justice Brennan, writing for a plurality of four justices,[244] reasoned that like the Fourteenth Amendment, the Commerce Clause is both a grant of legislative power to Congress and a concurrent limitation

237. U.S. CONST. amend. XIV, § 1.

238. 427 U.S. 445 (1976).

239. *Id.* at 453.

240. *Id.* at 454 (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1880)).

241. *Id.* (quoting *Ex parte* Virginia, 100 U.S. at 346–47).

242. *Id.* at 456.

243. 491 U.S. 1 (1989).

244. Justice White concurred, but noted that although he agreed "with the conclusion reached by Justice Brennan," he did "not agree with much of his reasoning." *Id.* at 57 (White, J., concurring in part and dissenting in part).

on the sovereignty of the states.[245] Thus, by generalizing the supremacy theme in *Fitzpatrick* to Congress's Article I powers, he concluded that Congress could abrogate state sovereign immunity by legislating pursuant to the Commerce Clause.

Although *Fitzpatrick* remains good law,[246] *Union Gas* quickly became a casualty of the overriding interest in state sovereignty that has characterized the new federalism. It lasted only seven years before being overruled in *Seminole Tribe of Florida v. Florida*,[247] which held that Congress did not have the power to abrogate state sovereign immunity when legislating pursuant to its Article I powers, such as the Commerce Clause.[248] The decision in *Seminole Tribe* relies heavily on the Eleventh Amendment, but Chief Justice Rehnquist candidly admitted that the text itself was not controlling, going so far as to call the text of the Eleventh Amendment a "straw man."[249] Instead, the Amendment was important as the textual embodiment of the principle of state sovereign immunity:

> It was well established in 1989 when *Union Gas* was decided that

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245. *Id.* at 16–17 ("Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States. It cannot be relevant that the Fourteenth Amendment accomplishes this exchange in two steps . . . while the Commerce Clause does it in one." (internal citations omitted)). For the latter principle, Justice Brennan relied primarily on the dormant Commerce Clause cases. *Id.* at 20.

246. The Court recently reaffirmed *Fitzpatrick*'s abrogation rule for statutes passed pursuant to the Fourteenth Amendment in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that Congress validly enacted the Family Medical Leave Act pursuant to § 5 of the Fourteenth Amendment, and therefore that it successfully abrogated state sovereign immunity). Its applicability has been greatly constrained, however, because, in another aspect of the new federalism, the Court has limited Congress's ability to legislate pursuant to § 5 power. *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365–74 (2001) (Americans with Disabilities Act not a valid exercise of § 5 power, and therefore unable to abrogate state sovereign immunity); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80–92 (2000) (Age Discrimination in Employment Act not a valid exercise of § 5 power, and therefore unable to abrogate state sovereign immunity); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636–48 (1999) (Patent and Plant Variety Protection Remedy Clarification Act not a valid exercise of § 5 power, and therefore unable to abrogate state sovereign immunity); City of Boerne v. Flores, 521 U.S. 507, 530–36 (1997) (legislation passed pursuant to § 5 power must be proportional and congruent to state constitutional violations that Congress seeks to remedy).

247. 517 U.S. 44 (1996).

248. The decision in *Seminole Tribe* deals specifically with Congress's power under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, but the Court was clear that its decision applied to all Congress's Article I powers, including the Interstate Commerce Clause. *See Seminole Tribe*, 517 U.S. at 72.

249. *Id.* at 69.

> the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III.... And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III."[250]

Although this passage demonstrates that *Seminole Tribe* relies on structural reasoning, it is important to note that sovereign immunity itself is employed as a constitutional principle, and the Eleventh Amendment itself is given extra-textual effect. The broader state sovereignty theme does play a supporting role in *Seminole Tribe*,[251] but the primary structural argument relies directly on the Eleventh Amendment and sovereign immunity.

In *Alden v. Maine*[252] the Court extended the reach of state sovereign immunity to state courts, holding that Congress does not have the power to make states subject to suit in their own courts when legislating pursuant to its Article I powers. Perhaps because the decision moved even further from the text of the Eleventh Amendment, which is directed at the jurisdiction of the *federal* courts, Justice Kennedy's majority opinion in *Alden* relied heavily on the general state sovereignty principle. In fact, he began his analysis by building the state sovereignty principle from the text of the Constitution:

> Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. Any doubt regarding the constitutional role of the States as sovereign entities is removed

250. *Id.* at 64 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984)) (alteration in original).

251. *Id.* at 68 ("'Behind the words of the constitutional provisions are postulates which limit and control.... There is... the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits....'") (quoting Monaco v. Mississippi, 292 U.S. 313, 321–23 (1934)).

252. 527 U.S. 706 (1999).

> by the Tenth Amendment.... The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[253]

After concluding based on this analysis that the states retain "'a residuary and inviolable sovereignty,'"[254] Justice Kennedy applied his principle to derive the sovereign immunity rule: "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."[255]

In response, the dissenters in the sovereign immunity cases turned to the federal supremacy principle that they had championed in the anticommandeering and Commerce Clause cases. Although it can be lost amidst his comprehensive eighty-five page confrontation of the majority's reasoning on textual, historical, and practical grounds, the best example of federal supremacy structural reasoning is found in Justice Souter's *Seminole Tribe*[256] dissent. He argued that through the Constitution, the People divided sovereignty between the federal government and the states.[257] Where the Constitution granted sovereignty to the federal government, it was withheld from the states.[258] Therefore, when acting pursuant to its delegated powers, Congress is free to abrogate sovereign immunity:

> [T]he ratification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign power to a National Government that was paramount within its delegated sphere.[259]

Putting it another way, he stated: "[T]he adoption of the Constitution

253. *Id.* at 713–14 (citations omitted).

254. *Id.* at 715 (quoting THE FEDERALIST NO. 39 (James Madison)).

255. *Id.* at 728. In its most recent expansion of the sovereign immunity doctrine, the Court held that sovereign immunity applied equally to adjudications in federal administrative agencies. *See* Fed. Mar. Comm'n v. South Carolina, 535 U.S. 743 (2003). The Court in *Federal Maritime Commission* relied on *Alden's* reasoning, and derived sovereign immunity from the general principle of state sovereignty. *Id.* at 751–53.

256. 517 U.S. at 100–85 (Souter, J., dissenting).

257. *See id.*

258. *Id.* at 150–55.

259. *Id.* at 153–54.

made [the states] members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy."[260]

As in the regulatory immunity and anticommandeering cases, each side was willing to give either the Tenth Amendment or the Supremacy Clause broad extra-textual effect, but neither considered the possibility that both clauses warranted an expansive interpretation. For example, in *Federal Maritime Commission v. South Carolina*,[261] which extends the sovereign immunity rule to adjudications before federal administrative agencies, Justice Breyer's dissent constrained the Tenth Amendment to its literal terms:

> The Court's principle lacks any firm anchor in the Constitution's text.... The Tenth Amendment cannot help. It says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution has "delegated to the United States" the power here in question, the power "[t]o regulate Commerce with foreign Nations, and among the several States."[262]

Similarly, though willing to give extra-textual effect to the Tenth Amendment to help derive the state sovereignty principle in *Alden*, Justice Kennedy discounted arguments that the Supremacy Clause, invoked through the exercise of Congress's Article I powers, could override state sovereign immunity: "As is evident from its text, however, the Supremacy Clause enshrines as 'the supreme law of the Land' only those Federal Acts that accord with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power."[263]

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260. *Id.* at 150. The dissenters also invoked the federal supremacy principle in other sovereign immunity cases. For example, Justice Souter reprised his split sovereignty argument in his *Alden* dissent, 527 U.S. at 799–800, and Justice Stevens invoked the Supremacy Clause as a partial answer to sovereign immunity in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 96 (2000).

261. 535 U.S. 743 (2003)

262. *Id.* at 777 (citations omitted).

263. *Id.* at 731 (internal citation omitted).

V. RESOLVING THE SOVEREIGNTY/SUPREMACY DEBATE: WHO HAS THE BETTER STRUCTURAL ARGUMENT?

The new federalism cases, and their immediate predecessors concerning state regulatory immunity, show a clear fissure within the Court over the proper structural view of federalism. One side, in the majority for the last fifteen years, sees federalism through the lens of a state sovereignty principle derived in large part from the Tenth Amendment.[264] The other, in dissent throughout the recent "federalist revival" after prevailing in *Garcia*, focuses instead on a federal supremacy principle grounded in the Supremacy Clause.[265] Having analyzed the cases, it is now possible to address in context the question raised at the outset—who has the better structural argument? A close analysis of their positions shows that both have strong arguments, but that neither presents a comprehensive view of the Constitution's structure. Federalism, as created by our Constitution, is not primarily premised on either state sovereignty or federal supremacy, but is instead a careful balance between the two. As James Madison stated in *The Federalist No. 39*: "The proposed Constitution, therefore, . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both."[266]

A. The Constitution's Approach to the Sovereignty/Supremacy Debate: A Balanced Conception of Federalism

Viewed in isolation, it is hard to fault the principle relied on by either side in this running debate. The concept of state sovereignty is implicit, not just in the Tenth Amendment and the enumeration of powers, but in myriad other aspects of the Constitution noted by the majority opinions in *Printz*[267] and *Alden*.[268] Likewise, as noted by Justice

264. Vicki Jackson has described this aspect of the new federalism as an "assertion of a purportedly clear founding vision, a vision in which the emphasis is less on the supremacy of federal law and more on maintaining a balance of powers between the states and the national government." Jackson, *supra* note 125, at 235.

265. Of course, this debate is not a modern creation, nor has it been fought solely in the federal courts. The question of the proper balance between the states and the federal government has been with us since the ratification debates, and was in many ways responsible for the Civil War. For a detailed discussion of the historical sovereignty/supremacy debate both during ratification and thereafter in the Supreme Court, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 652–81 (1993).

266. THE FEDERALIST NO. 39 (James Madison).

267. 521 U.S. 898, 918–21 (1997).

268. 527 U.S. 706, 713–15 (1999).

Brennan's dissent in *National League of Cities*,[269] and Justice Souter's *Seminole Tribe* dissent,[270] the federal supremacy principle is evidenced both by the Supremacy Clause and the Constitution's division of authority between the federal government and the states. However, if both are right to derive the principle upon which they rely, each must also be wrong in failing to recognize that their principle is moderated by the countervailing theme advanced by the other side.

In fact, a curious similarity between the Tenth Amendment and the Supremacy Clause confirms that *both* are particularly amenable to extra-textual interpretation; both the Supremacy Clause and the Tenth Amendment are commonly understood as textually unnecessary. For example, in *United States v. Darby*,[271] the Court stated that the Tenth Amendment:

> states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment.[272]

Similarly, discussing the Supremacy Clause, Alexander Hamilton wrote in *The Federalist No. 33*:

> [I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if [the Supremacy Clause] were entirely obliterated as if [it] were repeated in every article. [It is] only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers.[273]

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269. 426 U.S. 833, 859–61 (1976) (Brennan, J., dissenting).

270. 517 U.S. 44, 150–54 (1996) (Souter, J., dissenting).

271. 312 U.S. 100 (1941).

272. *Id.* at 124; *see also* TRIBE, *supra* note 16, at 860 ("In most of these cases, however, the Court treated [the Tenth A]mendment not as expressing an independent constraint on federal power, but simply as stating the corollary to the proposition that federal power is indeed limited. The idea was that any powers *not* delegated to the federal government were, *ipso facto*, reserved to the states and their people. . . ."); New York v. United States, 505 U.S. 144, 157 (1992) (arguing that textual command of Tenth Amendment is "essentially a tautology").

273. THE FEDERALIST NO. 33 (Alexander Hamilton). Former Chief Justice Marshall's

In other words, the particular rules stated in the Tenth Amendment and the Supremacy Clause are assumed by larger organizing themes implicit in the Constitution's design. Because each provision represents a particular textual manifestation of a larger principle, both are convincing textual platforms for invoking their larger themes.

As noted in the cases, however, each side trumpets one provision and downplays the other. By taking that approach, both have committed the error the Court so carefully avoided in *Youngstown*. Just as an executive power theme should be balanced against other themes in the Constitution to derive the overarching separation of powers principle,[274] the state sovereignty theme and the federal supremacy theme must be balanced against one another to derive the Constitution's proper conception of federalism.[275] Although, as the often vigorous debates in the separation of powers cases can attest, it may not always be facially apparent how the balanced principle should apply to a given question, it is important that the Court address federalism cases with the balanced conception of federalism in mind. Focusing exclusively on state sovereignty or federal supremacy is simply to presume an answer *a fortiori*, without ever engaging the Constitution's true structure.

At first glance, it is difficult to see how state sovereignty and federal supremacy can be balanced against one another. They are, after all, diametrically opposed—how can the federal government be supreme if

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opinion in *Marbury* also treats the Supremacy Clause as confirmatory of a principle implicit in the remainder of the Constitution. 5 U.S. (1 Cranch) at 180.

274. *See supra* notes 66–73 and accompanying text.

275. Commenting on the structural debate between Justice Kennedy and Justice Souter in *Alden*, Lackland H. Bloom, Jr. has similarly argued that both conceptions of federalism are in some sense right. *See* Lackland H. Bloom, Jr., *Interpretive Issues in* Seminole *and* Alden, 55 SMU L. REV. 377, 391 (2002). Professor Bloom writes:

> The question is: who is correct, and how can we tell? The answer is, both are correct, at least in the abstract. Each conception of federal structure has a textual, theoretical, and historical pedigree and finds significant support in practice and precedent. Both make sense. If Justice Souter's conception is given complete free reign, especially in view of the enormous expansion of federal power over the past two centuries, there will be little, if anything, left of state sovereignty. If Justice Kennedy's conception is taken to the extreme, the States will be able to effectively block significant national objectives. Neither vision is completely acceptable. Both are essential.

Id. For Professor Bloom, because both the sovereignty and supremacy views are correct, the Court should look to see which is better supported by other interpretive methodologies in any given case. *Id.* By balancing the two principles against one another, however, this apparent conflict can be resolved as a structural matter, without reference to other methodologies.

the states are sovereign, and the states sovereign if the federal government is supreme? Fortunately, the Constitution provides significant guidance in finding the proper demarcation between these competing themes. The constitutional apparatus for achieving balance is the limitation on federal supremacy, and concurrent reservation of state sovereignty, inherent in the enumeration of federal power. Although the Supremacy Clause makes any law "made in Pursuance" of the Constitution the "supreme Law of the Land,"[276] the Constitution only provides Congress with the authority to legislate in certain enumerated areas.[277] It follows that the federal government is supreme, but only when acting within its limited sphere of authority. States, on the other hand, retain sovereign authority,[278] but only in areas in which the federal government has not been given the power to legislate, and is not, therefore, supreme.[279]

Read textually as individual clauses, neither the Supremacy Clause nor the Tenth Amendment answer the questions posed in the new federalism cases. Whether a law abrogating state sovereign immunity is made "in pursuance" of the Constitution, after all, is not self-evident, unless one rejects the possibility of structural (or even historical) interpretation altogether.[280] Read together, however, these aspects of

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276. U.S. CONST. art. VI, cl. 2. *See* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 119–124 (2003) (arguing that the "made in Pursuance" language is a constraint on federal power because it limits federal supremacy to areas within Congress's enumerated powers).

277. U.S. CONST. art. I, § 8.

278. A result ensured by the literal text of the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

279. Other commentators have noted that this interaction between the supremacy clause and the limitation on federal power inherent in the enumeration of powers and the Tenth Amendment provides the proper lens through which to address the scope of federalism. *See* Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1190 (2003) (stating that it is "obviously correct that the Constitution confers on Congress only certain enumerated powers and reserves the rest to the states. But the flip side of the coin is that where Congress has been granted an express power, it may be exercised to its fullest extent and preempt any contrary state laws," and calling this interaction a "fundamental tenet of constitutional structure"); Young, *supra* note 14 at 1671 (stating "[t]he federal government, in other words, is 'sovereign' only within its delegated sphere of activity, and conversely the states are 'sovereign' only within the scope of their reserved powers," and concluding that *Alden* is "profoundly wrong on the merits"); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985) (stating that the "limitation on federal authority inherent in the delegated nature of Congress'[s] Article I powers" is a "principal means chosen by the Framers to ensure the role of the States in the federal system").

280. At least one commentator has taken this position. Scott Fruehwald has argued that

the Constitution help to illustrate its balanced approach to federalism, and indicate where the federal government should be supreme and where the states should be sovereign.

Before rethinking the new federalism cases in light of the balanced view of state sovereignty and federal supremacy, it is important to pause briefly and address the argument that the Court already approaches federalism questions with this balance in mind. One might point out, for example, that there are limitations built into the general sovereign immunity rule.[281] *Fitzpatrick*,[282] for one, permits Congress to abrogate state sovereign immunity under section five of the Fourteenth Amendment, and *Ex parte Young*[283] permits suits for prospective relief against state officers. It is certainly true that there has been some balance in outcomes—*Garcia*[284] definitively proves that point. This does not mean, however, that the Court is engaging a holistic structural view of federalism that balances state sovereignty and federal supremacy. In *Garcia*, for example, neither side discussed the importance of a balanced approach to federalism; the narrow federal supremacy view simply had more votes.[285] In other instances, such as the *Ex parte Young* doctrine, the best explanation may be that the Court is merely adhering to a longstanding precedent.[286]

In other cases, the Court has explicitly drawn on the image of

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the three new federalism categories discussed can all be resolved as a textual matter. State sovereign immunity and anticommandeering doctrine are unprincipled, he argues, because the Supremacy Clause controls in the absence of a specific textual rule. *See* Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 MERCER L. REV. 811, 852–65 (2002). While interesting, this argument ignores not only 200 years of Supreme Court jurisprudence looking to the Constitution's structure for guidance, but also a fundamental aspect of written constitutionalism. As former Chief Justice Marshall explained in *McCulloch*, a constitution, by its nature, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." 17 U.S. (1 Wheat.) at 407.

281. *See* William E. Thro, *That Those Limits May Not be Forgotten: An Explanation of Dual Sovereignty*, 12 WIDENER L.J. 567, 580–82 (2003) (discussing aspects of sovereign immunity law that provide some balance between state sovereignty and the interest in the supremacy of federal law).

282. 427 U.S. 445.

283. 209 U.S. 123 (1908).

284. 469 U.S. 528.

285. *See generally id.*

286. *See, e.g.*, Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) (unanimously affirming application of the *Ex parte Young* doctrine without any discussion of the underlying policy or the need to balance state sovereignty and the supremacy of federal law).

"balance" between the federal government and the states. For example, in *Gregory v. Ashcroft*,[287] a 1991 case finding that the Age Discrimination in Employment Act does not apply to state judges, Justice O'Connor asserted the importance of maintaining "a proper balance between the States and the Federal Government."[288] Similarly, Justice Kennedy's concurring opinion in *Lopez* states: "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[289] In practice, however, this is not the principle that is actually applied in the new federalism cases. Instead, as we have seen, each side pursues a narrow vision, premised solely on either state sovereignty or federal supremacy, not a balance between the two. Where each side reads either the Tenth Amendment or the Supremacy Clause extra-textually and concurrently seeks to limit the countervailing provision to its literal text, even explicit talk about "balance" is little more than lip service.

B. Applying the Balanced View of Sovereignty and Supremacy to the New Federalism Cases

Having concluded that both sides have failed to capture the proper structural conception of federalism, one important question remains to be addressed: Applying the balanced view, how should the new federalism cases have been resolved? If, as I have argued, the balance between state sovereignty and federal supremacy must be derived primarily from the limits on the scope of federal power, the state regulatory immunity, sovereign immunity, and anticommandeering cases all appear easy. No one in the regulatory immunity cases, for example, argued that Congress did not have the power to enact the FLSA.[290] Similarly, in the sovereign immunity cases, the question was not whether Congress had the power to enact the underlying statutes, but whether it could make states liable in private suits for violating them.[291] As for the Anticommandeering cases, Justice O'Connor flatly stated in *New York* that "[r]egulation of the . . . market in [radioactive]

287. 501 U.S. 452, 459 (1991).

288. *Id.*

289. 514 U.S. 549, 578 (1995) (Kennedy, J., concurring); *see also* Jackson, *supra* note 125, at 235 (discussing a balance theme in the new federalism cases).

290. *See generally Garcia*, 469 U.S. 528.

291. *See generally* Alden v. Maine, 527 U.S. 706 (involving the FLSA as well).

waste disposal is . . . well within Congress'[s] authority under the Commerce Clause."[292] Because Congress was acting within the scope of a delegated power, the presumption is that federal supremacy should trump state sovereignty. This presumption, however, must be considered in light of the relative weight of the state sovereignty and federal supremacy interests at issue in a given case. In certain circumstances, even though Congress may be acting within the scope of an enumerated power, a strong interest in state sovereignty could control where there is no significant countervailing interest in federal supremacy.

When analyzed in light of this additional consideration, the anticommandeering cases become significantly different from the regulatory and sovereign immunity cases. Both the regulatory and sovereign immunity cases involve Congress subjecting states to regulation under its enumerated powers—in other words the states are being regulated, along with others, as actors participating in interstate commerce (or economic activity substantially affecting interstate commerce). For example, in *Alden* Congress had attempted to make states liable on equal terms with other employers for violating the FLSA.[293] In the anticommandeering cases, on the other hand, the issue is whether Congress can employ the states as instruments in its regulatory activity. For example, in *New York*[294] Congress sought to force states to provide for the disposal of low-level radioactive waste, and in *Printz*[295] Congress sought to compel state law enforcement officers to administer a federal regulatory scheme. Although Congress was prevented from directing the states as instrumentalities of its power, it was in no way impeded from controlling all participants engaging in the regulated activity.

This is a key distinction with important implications for the balance between state sovereignty and federal supremacy.[296] The Constitution

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292. 505 U.S. 144, 160 (1992); *see also* Printz v. United States, 521 U.S. 898, 902–03 (1997) (the Brady Act, at issue in *Printz*, attempted to employ state law enforcement officers in the regulation of hand gun sales).

293. 527 U.S. at 711–12; *see also* Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360–61 (2001) (addressing applicability of Americans with Disabilities Act remedies to states as employers).

294. 505 U.S. at 174–77.

295. 521 U.S. at 902–03.

296. *Seminole Tribe* is an important exception to this general statement. *Seminole Tribe* dealt with a provision of the Indian Gaming Regulatory Act that subjected states to suit by tribal governments for failing to negotiate in good faith over the development of casinos on tribal lands. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996). This is quite different

grants Congress the power to regulate interstate commerce. Because states are significant participants in the economy,[297] Congress would be effectively denied full control over this enumerated power if it could not subject states to regulation on equal terms with private actors.[298] The regulatory and sovereign immunity paradigms, therefore, directly implicate a core premise of the supremacy principle—the fulfillment of Congress'[s] enumerated powers.[299] The anticommandeering rule, however, does not in any way prevent Congress from regulating pursuant to its enumerated powers; it merely prevents Congress from employing the states as instruments in its regulatory efforts. The supremacy interest, therefore, is significantly less important in the anticommandeering paradigm.

On the other side of the equation, congressional commandeering implicates a key element of state sovereignty that the regulatory and sovereign immunity cases do not—separateness. The federal government and the states are separate entities, accountable to, and deriving their sovereign authority from, distinct polities.[300] The states

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from the facts at issue in cases like *Alden*, 527 U.S. at 711–12, and *Garrett*, 531 U.S. at 360–61, which involved congressional attempts to subject states to regulations (and enforcement through private suit) generally within the ambit of the commerce power. For purposes of this analysis, therefore, *Seminole Tribe* may be more similar to the anticommandeering cases than to the other sovereign immunity cases.

297. For example, according to statistics from the United States Census Bureau, state governments employ approximately 5,072,130 employees nationwide, with a monthly payroll of $14,837,809,127. U.S. Census Bureau, State Gov't Employment and Payroll, March 2002, Summary Table, *available at* http://ftp2.census.gov/govs/apes/02stus.txt.

298. In fact, that is the result of the state sovereign immunity cases. Under current doctrine, Congress does not have the power to subject the states to the same enforcement mechanisms as other employers. *See, e.g.*, *Alden*, 527 U.S. at 711–12; *Garrett*, 531 U.S. at 360–61.

299. As Alexander Hamilton stated in *The Federalist No. 33*:

> But it is said that the laws of the Union are to be the *supreme law* of the land. What inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.

THE FEDERALIST NO. 33 (Alexander Hamilton).

300. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803 (1995) (holding that the federal government owes its allegiance to the people of the United States as a whole, not the various peoples of the individual states).

are subject to regulation in areas where the federal government is supreme, but they are not subunits of the federal government, and treating them as such creates its own set of problems. As Justice O'Connor persuasively argued in *New York*, congressional commandeering allows the federal government to obscure accountability for its regulatory decisions:

> If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the federal government directs the States to regulate, it may be the state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[301]

Although the primary constitutional mechanism for preserving the balance between state sovereignty and federal supremacy is the limitation on the scope of federal power, a proper balanced approach must also include an analysis of the supremacy and sovereignty interests at issue in a given case. Application of the balanced structural approach will usually hold that when Congress is acting within the scope of a federal power, the supremacy interests will prevail. But the principle's application in the anticommandeering cases shows that this is not always true. Because congressional commandeering does not further primary supremacy interests, but does implicate strong state sovereignty concerns, a balanced structural approach to federalism would support the Court's anticommandeering rule, despite the fact that Congress is acting within the scope of its enumerated powers. Regulatory and sovereign immunity, on the other hand, do implicate important supremacy concerns. In those cases, therefore, the presumption accorded legislation enacted pursuant to Congress'[s] enumerated powers should control. The scope of federal power inquiry, therefore, is best conceived as an imperfect approximation of the Constitution's

301. 505 U.S. 168–69 (internal citations omitted); *see also* Printz v. United States, 521 U.S. 898, 902–03 (1997).

attempt to balance state sovereignty against federal supremacy.

That leaves the Commerce Clause cases, where the Court was asked to determine whether Congress had acted within the scope of its delegated powers. Obviously, where the scope of federal power is itself the question before the Court, assessing whether Congress has exceeded its enumerated powers cannot be the threshold inquiry. Nonetheless, the fact that the sovereignty/supremacy balance is primarily maintained through limits on the scope of congressional authority is an important indirect consideration. Citing a long line of precedents dating back to the New Deal and even the Marshall Court, the dissenters in *Lopez*[302] and *Morrison*[303] argued that the Commerce Clause should be read to grant Congress the power to regulate any activity that "significantly" or "substantially" affects interstate commerce. Proceeding from that premise, they argued that because the cumulative effect of guns in schools (*Lopez*) and violence against women (*Morrison*) has a substantial impact on interstate commerce, Congress should be free to address these activities through the commerce power. This is a textually plausible reading of the Commerce Clause—the power to regulate interstate commerce could certainly be taken to imply the power to regulate anything that has a substantial effect on interstate commerce[304]—and was supported by a long string of cases relying on the "substantial effects" test.[305] Under this broad theory of substantial effects, however, there is virtually no limit on the reach of congressional power. As Justice Breyer stated in his *Morrison* dissent: "[w]e live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at

302. 514 U.S. 549, 615 (1995) (Breyer, J., dissenting).

303. 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

304. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942). The Court stated in *Wickard*, for example:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id.

305. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Assn., 452 U.S. 264, 277 (1981); *Wickard*, 317 U.S. at 125.

least when considered in the aggregate."[306] If Congress can regulate anything that has a substantial effect on interstate commerce, and every type of activity has such an effect, the Commerce power is essentially a grant of plenary authority.[307] This may be an acceptable textual or doctrinal interpretation, but it squarely contradicts the balanced structural view of federalism. If state sovereignty is primarily protected by limitations on congressional power, it cannot be that Congress has virtually unlimited power. Because some limitation on the substantial effects rule is necessary to protect state sovereignty, *Lopez* and *Morrison* were correctly decided.[308]

Looking only at outcomes, it seems the Court has done a fairly good job of applying the balanced view of state sovereignty and federal supremacy. Of the four doctrinal areas I have addressed with that approach in mind, only one, state sovereign immunity, should have been decided differently. Although this may indicate that the balanced view is at work behind the scenes, addressing it explicitly could have avoided the over-reliance on state sovereignty in the sovereign immunity cases, and could help both sides avoid over-reliance on preferred principles in future cases. Structural reasoning can be a useful tool in constitutional interpretation, but as with any approach it must be done well. A holistic structural view of federalism requires that state sovereignty and federal supremacy be balanced against one another, not invoked in isolation.

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306. 529 U.S. at 660 (Breyer, J., dissenting).

307. *See Lopez*, 514 U.S. at 564.

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens.... Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. (internal citations omitted).

308. I do not mean to argue that the balanced structural view of federalism dictates the specific limits of the commerce power. As Grant Nelson and Robert Pushaw, Jr., have noted, broad structural theories of federalism do not speak to the precise contours of the commerce power. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 96–100 (1999). The balanced structural view of federalism simply requires that there be *some* limit on the commerce power.

VI. CONCLUSION

Beginning with opinions by Chief Justice John Marshall in the late 1700's, the Supreme Court has long employed structural reasoning as an interpretive tool in its constitutional cases. It should be no surprise, then, that structural arguments have played a key role in the Court's recent federalism cases. The use of structuralism in the new federalism is not itself unwelcome—structuralism is a perfectly legitimate interpretive methodology, balancing the need for flexibility with respect for the Constitution's text. A good structural argument, however, requires attentiveness to the entire document to ensure that any principle derived from the text fairly represents the Constitution as a whole. Neither the majority nor the dissenters have adhered to this rule; and as a consequence, both have failed to capture the true (or complete) structure of federalism set out in the Constitution, which requires a careful balancing act between state sovereignty and federal supremacy. Instead, each side invokes one of these countervailing principles while ignoring the other. Although the Court's tunnel vision has only led to one significant misstep—the state sovereign immunity doctrine—both the majority and the dissenters should avoid similar overreaching in the future by balancing state sovereignty and federal supremacy against one another when considering federalism questions.